

To: Vivian Aucoin[Vivian.Aucoin@LA.GOV]
Cc: Donald Trahan[Donald.Trahan@LA.GOV]; Donaldson, Guy[Donaldson.Guy@epa.gov]
From: Huser, Jennifer
Sent: Wed 12/14/2016 9:53:27 PM
Subject: EPA Region 6 Comment Letter Regarding October 20, 2016 LA RH SIP
[TCEQ - Greg Nudd - Re Concerns on CALPUFF BART analyses and future analyses.pdf](#)
[TCEQ - Important - BART CAMx modeling guidance change.pdf](#)
[EPA R6 Comment Letter for LA RH EGU BART.pdf](#)

Vivian,

Please find attached an electronic copy of EPA's comment letter on the LA RH EGU BART proposed SIP revision, as well as two documents referenced in a footnote. We appreciate the work it took to put this SIP together and look forward to working with you to finalize the SIP. Please feel free to contact me if you have any questions.

Thanks,

Jennifer Huser

Environmental Scientist

Air Planning Section (6MM-AA)
USEPA Region 6
1445 Ross Ave. Suite 1200
Dallas, TX 75202-2733
214-665-7347



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

DEC 14 2016

Ms. Vivian Aucoin
Air Quality Assessment Division
Office of Environmental Assessment
Louisiana Department of Environmental Quality
P.O. Box 4314
Baton Rouge, LA 70821-4314

Dear Ms. Aucoin:

Thank you for the opportunity to provide comments on the October 20, 2016 State Implementation Plan (SIP) proposed revisions for Louisiana's Regional Haze Rule EGU Best Available Retrofit Technology (BART). This proposed SIP revision addresses proposed BART determinations and controls to meet the BART requirements of the Regional Haze Rule. To enable EPA to efficiently address the outstanding obligations for Louisiana's Regional Haze Program, please submit any SIP revision to address Louisiana's EGU BART obligation no later than January 31, 2017. *Sierra Club v. McCarthy*, Case 1:15-cv-01555-JEB.

The Clean Air Act and subsequent federal regulations require Louisiana to submit SIP revisions to the EPA to protect public health and welfare from air pollution from a diverse array of sources. We appreciate the efforts of the State in developing this SIP revision.

Our detailed comments on the proposed rules are included as an attachment to this letter. Please note that our comments today do not constitute final determinations concerning approvability of the proposed revisions to the Louisiana SIP. Comments on the November 20, 2016 EGU BART Analysis Addendum will be provided in a separate letter by December 30, 2016. Please contact me, or Ms. Jennifer Huser at 214-665-7347, if you have any questions.

Sincerely yours,

for Guy Donaldson
Chief
Air Planning Section (6MM-AA)

Cc: Donald Trahan, LDEQ

Enclosure: Detailed Comments

Detailed Comments

Louisiana State Implementation Plan Regional Haze Rule EGU BART and SIP Revision

1. *Lafayette Utilities System Louis "Doc" Bonin Generating Station* – LDEQ noted in the SIP revision that this facility has been put into cold storage. LDEQ's proposed SIP states that as a result of the units 1, 2, and 3 being in cold storage, BART is no longer applicable, however, because the units could potentially re-start in the future, please provide a permit rescission and remove the facility from the emissions inventory. The permit rescission and removal from the emissions inventory show that the facility cannot start up again without obtaining a new permit. Alternatively, LDEQ may rely on another enforceable mechanism, e.g., an AOC, to ensure the facility cannot start up without obtaining a new permit. Otherwise, a full BART analysis is required for the subject to BART units.
2. *Entergy Michoud Generating Station* – LDEQ noted in the SIP revision that this facility has been permanently retired as of June 1, 2016. Please provide a permit rescission and the revised emissions inventory showing the removal of the facility. The permit rescission and removal from the emissions inventory show that the facility cannot start up again without obtaining a new permit.
3. *Entergy Ninemile Point* – In its proposed SIP revision, LDEQ concluded that no additional controls were necessary to meet BART for Units 4 and 5 at Entergy's Ninemile Point based on CALPUFF modeling and the five factor analysis. LDEQ states that fuel oil burn heat input is limited to less than or equal to 15% on an annual basis for each unit. According to permit 1340-00006-V3, Unit 4 burns natural gas as its primary fuel and No. 2 and No. 4 fuel oil as its secondary fuels with a maximum unit heat input of 7,146 MMBtu/hr. Unit 5 burns primarily natural gas and No. 2 and No. 4 fuel oil with a maximum heat input capacity of 7,152 MMBtu/hr. Specific requirements within the permit restrict fuel burning to less than or equal to 15% on an annual basis for each unit. However, to comply with the BART requirements, the Regional Haze SIP should establish enforceable emission limits for BART, even when no additional controls are necessary. CAA section 169A(b)(2), 40 CFR 51.308(e), and 64 FR 35714, 35741. For EGUs, the BART Guidelines found at 40 CFR Part 51 Appendix Y specify that emission limits have an averaging time of a 30-day rolling average. Please provide the basis for how a restriction on fuel oil equates to an SO₂ emission limit with compliance demonstrated on a 30-day rolling average basis. Alternatively, LDEQ may elect to set a fuel oil sulfur content standard consistent with a BART level of control.

In addition, in the cost-effectiveness calculations for fuel switching, the baseline emissions and emissions reduced are calculated based on actual maximum annual emissions during the 2000-2004 baseline period but it appears that the total annual

cost is based on calculating future fuel oil usage as 15% of the total annual-average heat input from the 2000-2004 baseline period. This results in high costs relative to the emissions reduced if the actual amount of fuel oil use is less than 15%. The emission reductions and costs should be calculated on a consistent basis to estimate the costs and emission reductions anticipated from a change in fuels.

4. *Entergy Little Gypsy* - In its proposed SIP revision, LDEQ concluded that no additional controls were necessary to meet BART for Units 4 and 5 at Entergy's Ninemile Point based on CALPUFF modeling and the five factor analysis. LDEQ states that fuel oil burn heat input is limited to less than or equal to 15% on an annual basis for each unit. According to permit 2520-00009-V4, Unit 2 has a maximum heat input rating of 4550 MMBtu/hr for natural gas and 3692 MMBtu/hr for fuel oil. The Unit 3 boiler has a maximum heat input rating of 5578 MMBtu/hr for natural gas and 5328 MMBtu/hr for fuel oil. Specific requirements within the permit restrict fuel burning to less than or equal to 15% on an annual basis for each unit. However, to comply with the BART requirements, the Regional Haze SIP must establish enforceable emission limits for BART, even when no additional controls are necessary. CAA section 169A(b)(2), 40 CFR 51.308(e), and 64 FR 35714, 35741. For EGUS, the BART Guidelines found at 40 CFR Part 51 Appendix Y specify that emission limits have an averaging time of a 30-day rolling average. Consequently, LDEQ should incorporate applicable SO₂ emission limits, with compliance demonstrated on a 30-day rolling average basis, into its SIP. Alternatively, LDEQ may elect to set a fuel oil sulfur content standard consistent with a BART level of control.

In addition, in the cost-effectiveness calculations for fuel switching, the baseline emissions and emissions reduced are calculated based on actual maximum annual emissions during the 2000-2004 baseline period but it appears that the total annual cost is based on calculating future fuel oil usage as 15% of the total annual-average heat input from the 2000-2004 baseline period. This results in high costs relative to the emissions reduced if the actual amount of fuel oil use is less than 15%. The emission reductions and costs should be calculated on a consistent basis to estimate the costs and emission reductions anticipated from a change in fuels.

5. *Entergy Willow Glen* - In its proposed SIP revision, LDEQ concurred with the facility's CALPUFF modeling and BART analysis based on the use of natural gas and concluded that the existing emission limits constitute BART. The subject to BART units are permitted to burn either natural gas or fuel oil; however, they have not burned fuel oil in several years and there are no plans to burn fuel oil in the future. The proposed SIP states that before fuel oil firing is allowed at the facility, a revised BART determination must be promulgated for all pollutants for the fuel oil firing scenario through a SIP revision approved by EPA. This approach is only federally approvable if it is made enforceable through a rule,

permit, or AOC. Alternatively, the permit should be amended to remove the option to burn fuel oil.

6. *CAMx Modeling* – The proposed SIP includes additional modeling using CAMx. While CALPUFF is the preferred air dispersion model for the purposes of BART analysis and is typically used at distances up to 400 km, CAMx modeling can be relied on for BART if conducted with an approved protocol. If the source is in CALPUFF range, available CALPUFF modeling will also be evaluated. EPA and Federal Land Manager representatives have previously approved a CAMx modeling protocol (2006/2007) that was used in the Texas Regional Haze action for BART screening since Texas had approximately 130 BART eligible sources and most of these were beyond 300 km or more Class I areas. The CAMx modeling performed for the Entergy facilities and Cleco facilities did not follow this protocol and does not follow the BART guidelines. More specifically, the protocol does not utilize actual 24-hr maximum emissions or assess the maximum modeled visibility impact over all modeled days.

We previously shared materials and guidance with LDEQ, Entergy, and Cleco about emission rates to model (using CEM data to select the actual 24-hr maximum emissions) and the metric to use in comparison for screening (maximum daily impact at each Class I area). EPA and FLMs agreed with the use of CAMx for screening BART sources in 2006/7 and approved of the protocol using the maximum (not 98th percentile) daily visibility impacts.¹ The Texas protocol addressed modeling for sources that did not usually have CEM data for the pollutants, so as an approximation of maximum 24-hour emissions we indicated doubling annual was generally acceptable in the absence of better data. The CAMx modeling for these Louisiana EGUs is evaluating NO_x, SO₂ and PM emissions and should have utilized CEM data for NO_x and SO₂ and doubled the PM emissions consistent with past practices and protocols.

Our initial review suggests that the submitted CALPUFF modeling is consistent with BART guidelines and EPA/FLM guidance and can be relied upon to determine if a source can be reasonably anticipated to cause or contribute to visibility impairment and to assess visibility benefits of potential controls. The proposed SIP proposes to rely on the CAMx modeling results to “add substance to the position that these units do not impact visibility at either Breton or Caney Creek”. We consider the CAMx modeling provided by Entergy & Cleco to be invalid for supporting any determination of minimal impacts. Furthermore, there is reasonable CALPUFF modeling available to evaluate impacts from these facilities and EPA has also done our own modeling with CAMx using the appropriate emissions and metrics for the coal-fired units in Louisiana that are BART eligible. We will provide the modeling results and files (if requested) in

¹ We note that in February 2007 EPA raised concern with using the 98th percentile for sources analyzed with CAMx, rather than the maximum or 1st high. TCEQ and EPA agreed that evaluation and screening would be done using the Maximum (1st High). See EPA-Snyder 2007, TCEQ -Knud 2007, TCEQ BART Screening Clarification 2007

the near future. In light of our concerns with industry's CAMx modeling and our CAMx modeling results we will be providing (in addition to existing CALPUFF modeling results), please clarify your position on which sources are reasonably anticipated to impact visibility at a nearby Class I area and are therefore subject-to-BART.




Greg Nudd
<GNUDD@tceq.state.tx.us>
02/15/2007 04:48 PM

To Erik Snyder/R6/USEPA/US@EPA
cc tim@den.nps.gov, Joe Kordzi/R6/USEPA/US@EPA, Bret
Anderson/ARTD/R7/USEPA/US@EPA, jlogan@fs.fed.us,
meredith_bond@fws.gov, Tim_Allen@fws.gov, Bruce
bcc

Subject Re: Concerns on CALPUFF BART analyses and future
analyses.

History:

 This message has been forwarded.

Erik,

Thanks again for putting the concerns in writing, it greatly helps our decision making process. The TCEQ Regional Haze Team has discussed your concerns internally and with the appropriate management.

We have been swayed by your arguments that the 98th percentile is not sufficiently conservative and will revise the CAMx BART modeling guidance to indicate that the High-1st-High and the 0.5 deciview threshold should be used to determine whether or not a source has screened out using the CAMx modeling platform.

However, our technical opinion is that, especially with the move away from the 98th percentile, the use of one year of meteorological data is sufficiently conservative for demonstrating that a source does not contribute to visibility impairment at a Class 1 area.

We acknowledge your concerns regarding the screening modeling that has already occurred. We don't necessarily agree with them, but we understand your position. We do agree that these decisions have been made and it is too late to reconsider them.

We will continue to seek your input on similar issues as this progresses because we appreciate your perspective and insight and because we want to keep the TCEQ, EPA and FLMs on the same page as much as possible.

If you have any further questions or unresolved concerns about these issues, please let us know.

Greg Nudd, P.E.
Technical Specialist
Air Quality Division
TCEQ
512-239-1247

>>>> <Snyder.Erik@epamail.epa.gov> 2/13/2007 9:56 AM >>>>

Hi Greg and others,

I apologize for the long email, but wanted to cover the details and I've included excerpts from the citations as an attachment.

EPA wishes to work through some issues that have recently arisen due to further review of techniques that TCEQ has utilized in the group screening analysis with CAMx and the draft model plant Addendums (I and II). We understand time is in short demand and further progress has to be taken quickly. We had a detailed conference call on February 8, 2007 with representatives of TCEQ, representatives of EPA, and representatives of the Federal Land Managers.

To provide a synopsis of our concerns, these are the abbreviated topics discussed in detail in the text below:

- The Guideline on Air Quality Models (40 CFR Part 51 App. W) and CALPUFF promulgations both give technical reasons justifying the requirement of a minimum of 3 years of meteorology data (MM5 type data) be used to capture year-to-year meteorological variability. (The CALPUFF promulgation citations are included and the same citations exist in the GAQM but were not included)
- The choice of the use of the 98% (High-8th High) was selected for the BART analysis (FR promulgating BART procedures 7/6/2005) based upon the level of model predictions that CALPUFF generates because of limited (conservative) chemistry. CAMx uses a more robust chemistry package and comparisons between the two models indicate that CAMx is less conservative in predicting high values for visibility impairment.
- The original draft protocol indicated that the CAMx work would use groups of at least 11 or 12 sources in the screening of groups. Later TCEQ work looked at smaller groups (as small as 5-6 sources) that reduced the level of conservatism of the analysis.

In our recent discussions last week we discussed these three areas of concern that affect our expectations for how additional screening modeling is conducted for the 49 sources that have not been screened out at this point. We are not requesting that TCEQ re-evaluate the sources that have been previously screened out from BART, but want to rectify these concerns in the path forward. For the sources that have been screened out with the group runs with CAMx, and the draft model plants, we are not requesting a re-screening be completed with another value than the High-8th High value. We are requesting that additional documentation of the distribution of model predictions be shared that shows the High-1st High through the High-8th High value for each of the groups that were evaluated. We are also requesting that the model plants that are tied to the High-8th High value not be allowed to be used to screen out any more sources than currently documented in the Addendums I and II. We are considering the Texas work to date as reviewed to be acceptable with the High-8th High as long as no future screening work will use this value (unless the

analysis is conducted with 3 years of MM5 data with observations and the CALPUFF modeling system in an approved protocol).

Further detailed discussion of our concerns

The two areas of concern are the length of meteorological period being modeled in comparison to EPA's Guideline on Air Quality Models (GAQM) included in Appendix W of 40 CFR Part 51. The other area of concern deals with the use of the 98th percentile (High-8th High value). The BART rule indicates that the 98th percentile was chosen based on the use of the CALPUFF modeling system that includes certain limitations in chemistry and analysis that the overall CALPUFF system yields a certain level of conservatism to the analysis. Because of these two issues our position is that for further CAMx modeling (small group or single source analyses) that the protocols (that EPA and FLMs will review concurrently with TCEQ) only use the High-1st High and that this value has to be below 0.5 deciview to allow a source to be screened out of BART.

Issue #1: As further detailed and highlighted in the attached citations from the Federal Register notice approving CALPUFF (April 15, 2003), EPA approved the use of three years of prognostic meteorological data (MM5 data) in lieu of using 5 years worth of NWS data. EPA spent considerable time in reviewing the issues and choosing a minimum of three years for prognostic meteorological data to be used in CALPUFF long range transport modeling analyses. As is documented in the highlighted citations, a minimum of five years is recommended to capture the year-to-year variability of longer periods and yield a stable distribution of model predictions when compared to a much longer period that fully encompass the year-to-year variability {GAQM 9.1.3.1(a)}. In weighing the minimum distribution to capture year-to-year variability in meteorological conditions and also make the burden of using a more sophisticated data set from a prognostic meteorological model reasonable, EPA determined a minimum of three years of prognostic meteorological modeling should be used. TCEQ's group screening modeling with CAMx utilizes only one-year worth of meteorological data in comparison to CALPUFF modeling conducted for BART screening that is required to use a minimum of three years. Since TCEQ's CAMx modeling only uses one year worth of meteorology, the year-to-year variability issue is not being addressed in this analysis, and another year could yield a more conservative list and result with less sources being screened out of BART. In our review of year-to-year variability of modeling included in permitting applications for impacts the High-2nd-High can vary on the order of 20% in value from year-to-year in three to five year periods. Furthermore a detailed review of High-8th-High would also

show a year-to-year variability of similar levels. Therefore, TCEQ's use of the High-8th-High is not as conservative a test as using three years worth of MM5 data, nor is it an approved technique in accordance with the requirements of the Guideline on Air Quality Models 9.1.3.2(d).

Issue #2: The other technical and regulatory issue of concern is the use of the High-8th-High based on a 98% that was set in the BART regulations included in the July 6, 2005 Federal Register. As discussed in detail on pages 39121-39124, the use of the 98th percentile was chosen based on the use and technical knowledge of the level of conservatism that the CALPUFF modeling system was known to generate. In the notice EPA indicated that there are other features of our recommended modeling approach (using the CALPUFF system) that are likely to overstate the actual visibility effects of an individual source. Most important, the simplified chemistry in the model (CALPUFF) tends to magnify the actual visibility effects of that source. Because of these features and the uncertainties associated with the model, EPA believed it was appropriate to use the 98th percentile for CALPUFF. Elsewhere in the notice (page 39123-4), EPA discussed the conservatism and the level of over-prediction of visibility impairment that CALPUFF would yield due to CALPUFF's simple chemistry. EPA also discussed that states may wish to evaluate other models such as regional photochemical models, but the chemistry in these models is more sophisticated and would be less conservative in yielding visibility impairment estimates than the use of the CALPUFF modeling system. Some technical analyses have been provided that also document that the absolute maximum predicted by CALPUFF is significantly greater than values predicted with a photochemical model (see evaluations/presentations of CALPUFF vs. CAMx predictions for LADCO sources presented by Environ/LADCO). For these technical and regulatory basis reasons, we do not think it is appropriate for further analyses with CAMx to utilize the High-8th-High value.

Issue #3: Originally the work that TCEQ undertook was understood (as outlined and discussed in teleconferences on the draft modeling protocol) to be utilizing only groups of 11 or more sources and not smaller groups (as small as 5-6) as was done in subsequent work. The switch to smaller groups took away some of the conservatism that we originally considered in evaluating the draft modeling protocol.

Issue#4: In other non-guideline techniques and techniques not as conservative as the EPA recommended technique, we have agreed to allow areas to use the High-1st-High in their BART screening analyses. Examples of areas that have used the High-1st-High are the

CENRAP BART CALPUFF protocol for CALPUFF without the incorporation of observations (GAQM requires prognostic meteorological analyses to incorporate observations), CAMx modeling conducted for Nebraska, and other states including Texas that have used the CENRAP protocol with 'no-obs'. Based on previous precedent for less conservative modeling that was conducted in a non-guideline technique, we do not believe that TCEQ should allow the current work using the High-8th-High to be used for any further screening analyses (including model plants based on previous work and documented in Addendums I and II) than has currently been completed and reviewed by EPA and the FLMs. EPA and FLMs have agreed that we will not request additional analyses with alternate cut point levels than the High-8th-High for the sources that were screened out to result in the 49 Texas sources still in the BART screening process at this time. We believe that TCEQ should agree to use the High-1st-High value in comparison against a 0.5 deciview value in future screening (group or individual sources) work with CAMx, as TCEQ has agreed in the CALPUFF w/o observations protocol. TCEQ should also submit the distribution of values from the High-1st-High to the High-8th-High for each of the source groups included in modeling conducted to this point.

If time allowed, potentially an analysis could be conducted in the two primary areas of concern to come up with estimates for adjustment factors. To address the issue from the impact of year-to-year variability (1-year vs. 3-years of met), an adjustment factor potentially could be created based on either evaluations of numerous modeling outputs, or running CAMx for 3 years of meteorology as mentioned by TCEQ last week. An analysis to attempt to estimate the difference in conservatism between CALPUFF and CAMx could also be potentially be done. In previous teleconferences, FLMs and EPA have requested any documentation that is available that would include comparisons of CALPUFF to CAMx results. If one or both of these type analyses were conducted, potentially the analyses would support consideration of using a value other than the High-1st High for future screening. If TCEQ wishes to discuss these potential options further, EPA and the FLMs would be happy to discuss potential options and analysis work that could be done.

In conclusion, at this point in time TCEQ has narrowed the BART eligible sources that have not been previously screened out to 49 sources. For the 49 sources left they have the option of conducting additional modeling with CAMx, CALPUFF with incorporation of observations, or CALPUFF w/o observations or moving directly to the 'factor analysis' in the BART determination process. For both additional CAMx work and CALPUFF with observations, a modeling protocol would have to be submitted to TCEQ and also EPA and the FLMs

for concurrent review and comment prior to finalizing the protocol and conducting modeling. EPA is recommending that TCEQ modify the protocol document provided for further CAMx modeling to reflect that the High-1st-High must be used, not the High-8th-High.

Thanks for the opportunity to work these issues out and work out an equitable solution that does not require the need to address previous decisions, but will result in future analyses that take into consideration technical and regulatory concerns that were raised. If you have questions, please contact me to discuss further.

-Erik Snyder

Regional Air Quality Modeler
EPA Region 6
Phone: 214-665-7305
Fax: 214-665-7263
email: snyder.erik@epa.gov

(See attached file: Excerpts from FR-CFRs.doc)



Kathy Pendleton
<KPENDLET@tceq.state.tx.us>
s>

02/16/2007 09:37 AM

To Snyder@listserv.tceq.state.tx.us, Erik
Snyder/R6/USEPA/US@EPA

cc

bcc

Subject Important - BART CAMx modeling guidance change

History:

📧 This message has been forwarded.

Based upon concerns expressed by EPA Region 6 and several of the FLMs on the lack of conservativeness of the CAMx modeling system for estimating visibility impacts at Class I areas, the TCEQ has decided to revise the CAMx BART modeling guidance to indicate that the High-1st-High and the 0.5 deciview threshold should be used to determine whether or not a source has screened out using the CAMx modeling platform.

If you have any questions about this decision, please contact Jocelyn Mellberg at 512-239-0164.

You are currently subscribed to bart as: snyder.erik@epamail.epa.gov.

To unsubscribe send a blank email to leave-112245-63232K@listserv.tceq.state.tx.us

MEMORANDUM

SUBJECT: Grant of Petition for Reconsideration of the Regional Haze Federal Implementation Plan for Texas – **ACTION MEMORANDUM**

FROM: Janet G. McCabe
Acting Assistant Administrator (6101A)

TO: Gina McCarthy
Administrator (1101A)

Attached for your signature is a letter that responds to a March 2, 2016, petition submitted by Luminant Generation Company LLC (Luminant) requesting that the U.S. Environmental Protection Agency reconsider the final rule titled, “Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze.” 81 FR 296 (January 5, 2016). The response grants the petition. We are not granting Luminant’s request for an administrative stay because the Fifth Circuit Court of Appeals already issued a judicial stay of the Texas Federal Implementation Plan (FIP). The agency is not required to announce this action in the *Federal Register*.

SUMMARY OF ACTION

In December 2015, the EPA partially disapproved Texas’s regional haze state implementation plan and finalized a FIP with sulfur dioxide emission limits for nine electric generating units owned and operated by Luminant and four units owned by others. This action was taken to comply with the Clean Air Act’s (CAA) reasonable progress mandate for visibility protection at mandatory Class I federal areas. Luminant’s petition to the EPA seeks reconsideration and an administrative stay of the Final Rule pursuant to section 307(d)(7)(B) of the CAA. Among other things, Luminant asserts that the EPA proposed to rely on the EPA’s Cross-State Air Pollution Rule to satisfy the CAA’s Best Available Retrofit Technology (BART) requirement, but did not finalize this aspect of the proposal and did not offer the public adequate notice of this change.

Texas, Luminant and other parties also petitioned for review of the FIP. The Fifth Circuit Court of Appeals is reviewing that challenge and recently issued an order staying the December 2015 rule. Attempts to reach settlement among the parties have not been successful. The EPA, through the Department of Justice, recently filed a motion with the Fifth Circuit seeking a remand of the FIP and also seeking a stay on the litigation proceedings during reconsideration.

Internal, Deliberative Document – Do Not Cite, Quote, or Distribute

There is no statutory or court-ordered deadline for this grant of the petition for reconsideration. However, immediate action to grant the reconsideration is a necessary companion to a motion recently filed in the Fifth Circuit Court of Appeals regarding litigation on the above-referenced action. The agency is also seeking a stay of that litigation to conduct a reconsideration action.

Also underway is a separate rulemaking to propose and promulgate a FIP to address the requirement for BART. The proposal for this action will be signed by the EPA Region 6 Regional Administrator by December 9, 2016, and will include sulfur dioxide emission limits for some but not all of the nine Luminant units and some others. Granting this petition will allow a new proposal regarding reasonable progress to align with the BART FIP rulemaking, as has typically been the relationship in state plan and FIP development in other states.

Region 6 will publish a notice of proposed action and request for public comment in the *Federal Register* as the next step in this reconsideration. No schedule has been developed for when this will take place, but the Fifth Circuit may impose a schedule as part of its remand. If the Fifth Circuit does not impose a schedule, we expect this action would occur near mid-2017 or later.

RECOMMENDATION

I recommend that you sign the attached response letter granting the reconsideration.

Attachment

cc: Kristien Knapp, OA (1101A)

Grant of Petition for Reconsideration of the Regional Haze Federal Implementation Plan for Texas

TO: Janet McCabe
FROM: Vera Kornylak, Senior Policy Advisor (AQPD)

Janet –

Attached for the Administrator's signature is a letter that grants a petition submitted by Luminant Generation Company. The petition requests that the EPA reconsider a December 9, 2015 (published January 5, 2016), action involving the Texas Federal Implementation Plan (FIP) for regional haze. We recommend granting this petition which also complements our December 2, 2016, motion for remand of the Texas FIP in the Fifth Circuit Court of Appeals litigation over that action. OGC has confirmed we are not required to announce this action in the *Federal Register*. In light of the pending motion in the Fifth Circuit, it is important that this letter be signed fairly quickly. Litigants' response to the EPA's motion for remand is due on December 19, 2016. For this reason, we request that this letter be signed on or before December 15, 2016, if possible.

Please let me know if you have any questions.

Thanks,
Vera Kornylak
(919) 541-4067

Thu Mar 03 10:20:33 EST 2016
Yuhas.Darlene@epamail.epa.gov
FW: Petition for Reconsideration - Docket No. EPA-R06-OAR-2014-0754
To: CMS.OEX@epamail.epa.gov; Gaines.Cynthia@epamail.epa.gov; Veney.Carla@epamail.epa.gov

From: Moore, Stephanie [mailto:Stephanie.Moore@luminant.com]
Sent: Thursday, March 03, 2016 10:08 AM
To: McCarthy, Gina <McCarthy.Gina@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>; Curry, Ron <Curry.Ron@epa.gov>
Subject: Petition for Reconsideration - Docket No. EPA-R06-OAR-2014-0754

Dear Administrator McCarthy,

Please find attached a petition for reconsideration I am filing on behalf of Luminant Generation Company, LLC regarding the final regional haze rule for Texas published at 81 Fed. Reg. 296 (Jan. 5, 2016). I have also submitted this petition for reconsideration to you via U.S. Mail.

Thank you in advance for your consideration of Luminant's petition. Please contact me if you have any questions.

Sincerely,

Stephanie Zapata Moore

Luminant

VP & General Counsel

~~File~~
1801 Bryan Street, 22

Dallas, Texas 75201

214.875.8183 (Direct)

214.542.6460 (Mobile)

214.875.9478 (Fax)

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Stephanie Zapata Moore
Vice President & General Counsel
stephanie.moore@luminant.com

Luminant
1601 Bryan St.
Dallas, Texas 75201

T 214.875.8183
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March 2, 2016

Sent Via: U.S. Mail and electronic mail

The Honorable Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Request for Reconsideration of EPA's Final Rule titled "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" (81 Fed. Reg. 296 (Jan. 5, 2016) (Docket No. EPA-R06-OAR-2014-0754)

Dear Administrator McCarthy:

Luminant Generation Company LLC ("Luminant") respectfully requests that the U.S. Environmental Protection Agency ("EPA") grant reconsideration of the final rule titled *"Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze."* See 81 Fed. Reg. 296 (Jan. 5, 2016). Luminant commented on the proposed rule and has a substantial interest in the outcome of the final rule. Luminant owns and operates 9 of the 15 units that are directly regulated by the final rule, and because of the emission limitations in the final rule, Luminant is required to install over \$1 billion in pollution controls at these units.

Luminant requests that EPA convene a proceeding pursuant to 42 U.S.C. § 7607(d)(7)(B) to reconsider new aspects of the final rule. Under the Clean Air Act, the Administrator "shall convene a proceeding for reconsideration of the rule" if the person raising the objection demonstrates that: (1) "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) ;" and (2) "such objection is of central relevance to the outcome of the rule ." 42 U.S.C. § 7607(d)(7)(B). EPA must "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.*

As outlined below, it was not possible for Luminant to raise certain objections during the comment period, and each of these objections is of central relevance to the outcome of the final rule. Because both prerequisites are met, EPA "lack[s] discretion not to address the claimed errors." *North Carolina v. EPA*, 531 F.3d 896, 927 (D.C. Cir. 2008).

- **Synapse Report:** EPA contracted Synapse Energy Economics, Inc. (“Synapse”) to review a 2014 report issued by the Electric Reliability Council of Texas (“ERCOT”)¹ that addresses reliability issues associated with EPA’s regional haze proposal. The Synapse report was not submitted to EPA until September 8, 2015, nearly five months after the public comment period for the proposed regional haze rule was closed. EPA did not indicate in the proposal that it was considering hiring a contractor for this purpose. EPA has specifically relied on the Synapse report in the final rule to reject public comments regarding reliability issues. See 81 Fed. Reg. at 345 (“We reviewed and accept [Synapse’s] finding and adopt its conclusion that ERCOT’s report contained significant flaws. In sum, ERCOT’s report cannot support a determination that there is likely to be any significant, adverse effect on the supply, distribution, or use of energy.”). Reconsideration is warranted given EPA’s express reliance on the Synapse report—which was issued well after the comment deadline—to dismiss valid reliability concerns.
- **October 2015 ERCOT Study :** ERCOT, which ensures that the electric grid in Texas remains reliable, issued an updated report in October 2015 regarding reliability issues associated with EPA’s regional haze proposal.² The Synapse report was submitted to EPA in September 2015, and therefore, does not consider ERCOT’s updated findings regarding reliability. The final rule itself also does not acknowledge ERCOT’s October 2015 report. EPA must fully account for ERCOT’s updated assessment regarding regional haze before issuing a final rule. Relatedly, in the final rule, EPA asserts that its reliability analysis was based on its conclusion that the rule “should not require a source to shut down to comply.” Response to Comments at 162. This is a new determination by EPA and must be subject to notice and comment through the reconsideration process.
- **New Reasonable Progress Goals for 20% Best Days:** EPA’s final regional haze rule includes new reasonable progress goals (“RPGs”) for the 20% best days. In the final rule, EPA has quantified the RPGs as 5.70 dv at the Guadalupe Mountains National Park, 5.59 dv at Big Bend National Park, and 9.22 dv at Wichita Mountains National Wildlife Refuge. 81 Fed. Reg. at 306–07. EPA’s proposed rule, however, quantified RPGs for only the 20% worst days. EPA’s proposed rule was fundamentally flawed by not including proposed numerical values for the 20% best days, and therefore, EPA must consider public input on the newly calculated RPGs.
- **CSAPR/BART:** In the proposed rule, EPA stated that it would “replace Texas’ reliance on CAIR to satisfy the BART requirement for EGUs with reliance on CSAPR.” 79 Fed. Reg. 74,818, 74,823 (Dec. 16, 2014). Instead of finalizing this approach, EPA changed course and decided that “it would not be appropriate to finalize [its] proposed determination to rely on CSAPR as an alternative to SO₂ and NO_x BART for EGUs in Texas at this time.” 81 Fed. Reg. at 302. This proposed course of action was not discussed in the proposed rule, and thus it was not possible to comment on EPA’s deferral. By deferring this action, EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated. EPA must seek public comment on this fundamental difference between the proposed rule and final rule.

¹ ERCOT, *Impacts of Environmental Regulations in the ERCOT Region* (Dec. 16, 2014), <http://www.ercot.com/content/news/presentations/2014/Impacts%20of%20Environmental%20Regulations%20in%20the%20ERCOT%20Region.pdf>.

² ERCOT, *Transmission Impact of the Regional Haze Environmental Regulation* (Oct. 15, 2015), http://www.ercot.com/content/wcm/key_documents_lists/76860/Transmission_Impact_of_the_Regional_Haze_Environmental_Regulation__Oct_RPG.pdf.

- **EPA's Interpretation of the Clean Air Act** : In EPA's response to comment document, it claims that visibility benefit is "a consideration within the cost factor ." Response to Comments at 84, 88. This interpretation of the reasonable progress statutory factors, however, is at odds with EPA's proposed rule. Although EPA previously stated that "visibility is not an explicitly listed factor to consider when determining whether additional controls are reasonable," TX TSD at 18 , EPA did not state that it was interpreting "visibility" as a component of the statutory cost factor. EPA's disagreement with the Federal Land Managers, who warned EPA that it has no "statutory mandate" to consider visibility,³ is also a new finding and new aspect of EPA's final action . EPA's newly developed interpretation of the cost factor is grounds for reconsideration.

Luminant was not given the opportunity to raise any of the foregoing issues during the public comment period. Due to the central relevance of these issues to the final rule , reconsideration is required under 42 U.S.C. § 7607(d)(7)(B).

Finally, we also request that EPA reconsider its denial of Luminant's request for a stay of the effective date of the rule and its compliance deadlines pending judicial review. Luminant previously requested that EPA stay the rule pending judicial review, but EPA denied that request in its final action. 81 Fed. Reg. at 315. In light of the issues raised above and the reconsideration proceedings that are necessary, Luminant again requests that EPA reconsider its denial and grant a stay of the rule and its requirements.

Please contact me with any questions regarding this request for reconsideration.

Sincerely,



Stephanie Zapata Moore
General Counsel, Luminant

cc: Janet McCabe
Ron Curry

³ USDA Forest Serv., *Recommendations for Improved Implementation of the Regional Haze Program* 5 (May 2014), http://www.wrapair2.org/pdf/Final_RHR_USFS%20Improvement%20Suggestions%20May%202014.pdf.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS, et al.,)	
)	
Petitioners,)	No. 16-60118
)	
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY and GINA)	
McCARTHY, Administrator, U.S. EPA,)	
)	
Respondents.)	
_____)	

**RESPONDENTS' MOTION FOR
PARTIAL VOLUNTARY REMAND**

Respondents United States Environmental Protection Agency and Administrator Gina McCarthy (collectively, "Respondents" or "EPA") move the Court for an order remanding EPA's disapproval of portions of Clean Air Act ("CAA") State Implementation Plan ("SIP") submittals from the State of Texas and the State of Oklahoma, and the Federal Implementation Plans ("FIPs") promulgated by EPA as part of the final rule issued by EPA published at 81 Fed. Reg. 296 (January 5, 2016) ("Final Rule"). EPA consents to the continuation of the current stay of the remanded portions of the Final Rule until EPA completes final action on reconsideration of those portions of the Final Rule.

EPA seeks voluntary remand of the Final Rule’s SIP disapprovals and FIPs so that it may reconsider those actions in light of the discussion regarding likelihood of success on the merits set forth in the Court’s Order of July 15, 2016 (“Order”), in which the Court stayed the Final Rule “pending the outcome of this petition for review.” Order, at 44. Remand is also warranted because, as discussed below, EPA desires to reconsider at least one issue raised by petitioner Luminant Generation Company, LLC (“Luminant”) in a request it submitted to EPA for administrative reconsideration of the Final Rule. EPA also respectfully requests that the Court lift the stay pending appeal as to those portions of the Final Rule that approved provisions of the Texas and Oklahoma SIPs, and which have not been challenged in this petition for review.¹ If the Court grants this motion, all issues now pending in these petitions for review would be resolved.

Petitioners and petitioner-intervenors have requested that EPA include the following statement in this motion: “Petitioners and Petitioner-Intervenors do not join EPA’s Motion. Instead, they intend to

¹ The approved parts of the Texas and Oklahoma SIPs are reflected in the amendatory text to 40 C.F.R. §§ 52.1920(e) and 52.2270(c) in the Final Rule. 81 Fed. Reg. at 349-51.

review the motion once it is filed and to file a response or responses with the Court as appropriate, including potentially a request for different relief.” Petitioner-respondent National Parks Association has not stated a position regarding this Motion.

BACKGROUND

A. Statutory and Regulatory Background

Under the cooperative-federalism scheme of the Clean Air Act (“CAA” or the “Act”), 42 U.S.C. §§ 7401-7671q, EPA establishes standards that protect air quality and States implement those standards through “state implementation plans.” States submit SIPs to EPA, and EPA must determine whether the SIP “meets all of the applicable requirements of [the Act].” *Id.* §§ 7410(a)(1), 7410(k)(3); 40 C.F.R. § 51.104-105. If a State fails to submit a required SIP, a SIP is incomplete, or all or part of a SIP fails to meet the Act's requirements, EPA must promulgate a “federal implementation plan” (“FIP”). 42 U.S.C. § 7410(c)(1).

Congress in 1977 enacted 42 U.S.C. § 7491, entitled “Visibility protection for Federal Class I areas.” “Federal Class I areas” include national wilderness areas and national memorial parks exceeding 5,000 acres in size and national parks exceeding 6,000 acres in size. *Id.* §

7472(a). Congress declared as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from man-made air pollution." *Id.* § 7491(a)(1).

The CAA directed EPA to adopt regulations requiring States to revise their SIPs to include "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress" toward the national visibility goal. *Id.* § 7491(b)(2). The statute provides that SIPs (and by extension, FIPs) must include "a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal" *Id.* § 7491(b)(2)(B). States (or EPA in the case of a FIP) must determine what emission limits are necessary to achieve "reasonable progress" by considering four statutory factors: "the costs of compliance, the time necessary for compliance, and the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any existing source" *Id.* § 7491(g).

SIPs must also require that certain existing stationary sources, such as power plants built between 1962 and 1977, install the "best available retrofit technology" ("BART"), which is defined as "an emission limitation based on the degree of reduction achievable through the

application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility” The BART emission limit is to be established on a case-by-case basis after considering five statutory factors, including the costs of compliance, the energy and non-air quality environmental impacts of compliance, existing pollution control technology at the source, the remaining useful life of the source, and “the degree of improvement which may reasonably be anticipated to result from the use of such technology.” 42 U.S.C. § 7491(g)(2).

EPA’s Regional Haze Rule (“Haze Rule”) sets out the requirements for regional haze SIPs. 40 C.F.R. §§ 51.308. Rather than requiring natural visibility conditions to be achieved all at once, the Haze Rule sets up multiple planning periods. For each planning period, SIPs must include a “long-term strategy” for achieving reasonable progress and “reasonable progress goals” (“Progress Goals”) for each Class I area reflecting the visibility improvement that will be achieved at the end of the planning period by the measures in the long-term strategy. 40 C.F.R. §§ 51.308(d)(1), (d)(3).

In addition, the CAA provides that a SIP must assure that emissions within the State will not interfere with air pollution control

efforts in other States. 42 U.S.C. § 7410(a)(2)(D)(i). The Haze Rule contains several provisions to address the interstate transport of visibility-impairing pollution. First, a State's long-term strategy must "address[] regional haze visibility impairment . . . for each mandatory Class I Federal area located outside the State which may be affected by emissions from the State." 40 C.F.R. § 51.308(d)(3). Second, States must consult with one another "to develop coordinated emission management strategies." *Id.* § 51.308(d)(3)(i). Third, upwind States must demonstrate that their long-term strategies contain "all measures necessary to obtain [their] share of the emission reductions needed to meet the progress goal[s] for [downwind Class I] area[s]." *Id.* § 51.308(d)(3)(ii). Fourth, States must document the technical basis they used to determine the "apportionment of emission reduction obligations necessary for achieving reasonable progress in each mandatory Class I Federal area [they] affect[]." *Id.* § 51.308(d)(3)(iii). Finally, downwind States with Class I areas must consult with upwind States to determine whether the Progress Goals provide for reasonable progress. *Id.* § 51.308(d)(3)(iv).

In 2005, EPA issued the "Clean Air Act Interstate Rule" ("CAIR"), which required 28 States, including Texas, to reduce sulfur dioxide

("SO₂") and nitrogen oxide ("NO_x") emissions, which contribute to fine particle ("PM_{2.5}") and ozone pollution in downwind States. CAIR was remanded by the D.C. Circuit without vacatur to EPA. *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). In 2011, EPA issued the "Cross-State Air Pollution Rule" ("CSAPR") to replace CAIR. 76 Fed. Reg. 48,208 (Aug. 8, 2011). CSAPR established "budgets" for SO₂ and NO_x emissions for large EGUs in 23 States, including Texas. EPA issued a FIP for Texas which established CSAPR emission budgets for Texas electric generating units ("EGUs").

In 2012, EPA amended the Haze Rule to provide that participation by a State's EGUs in a CSAPR emissions trading program for a given pollutant would qualify as a "BART alternative" for those EGUs for that pollutant. 40 C.F.R. § 51.308(e)(4). In other words, a State participating in CSAPR would not be required to establish source-specific BART emission limits for each EGU in that State.

In *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015), the D.C. Circuit generally upheld the CSAPR program, but remanded the CSAPR Phase II SO₂ emissions budget for Texas EGUs to EPA.

B. Factual Background

1. The Final Rule

The State of Oklahoma submitted a regional haze SIP to EPA on February 19, 2010. EPA partially approved and partially disapproved the SIP. 76 Fed. Reg. 81,728 (Dec. 28, 2011). EPA ultimately promulgated a FIP requiring SO₂ scrubbers at six EGUs, *id.* at 81,729, which was upheld by the Tenth Circuit Court of Appeals. *Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013). EPA deferred action on Oklahoma's Progress Goals, 76 Fed. Reg. at 81,731, determining that sources in Texas affect visibility at the Wichita Mountains Wildlife Refuge (in Oklahoma), and that EPA first needed to review Texas's SIP submission to determine whether Oklahoma had met the CAA and Haze Rule reasonable progress requirements. 76 Fed. Reg. 16,168, 16,177 (March 22, 2011).

Texas submitted its regional haze SIP to EPA on March 31, 2009. In 2012, EPA finalized a limited disapproval of Texas' SIP for relying on the remanded CAIR to satisfy the State's BART obligations. 77 Fed. Reg. 33,642, 33,643 (June 7, 2012). On December 16, 2014, EPA proposed to take action on the remainder of Texas' and Oklahoma's regional haze

SIPs, including a proposal to promulgate a FIP that would rely on CSAPR to satisfy BART for Texas' EGUs. 79 Fed. Reg. 74,818.

On January 5, 2016, EPA issued the Final Rule, partially approving and partially disapproving the Texas and Oklahoma regional haze SIPs and promulgating FIPs for each State. 81 Fed. Reg. 296. EPA disapproved Texas's Progress Goals for the Big Bend and Guadalupe Mountains National Parks Class I areas, which were based on emission reductions from existing CAA programs only. *Id.* at 346. EPA found that Texas's four-factor reasonable progress analysis was flawed in multiple respects. *Id.* EPA disapproved Texas's long-term strategy because it failed to adequately evaluate and identify control measures to achieve reasonable progress at Wichita Mountains Wildlife Refuge or the State's own Class I areas. *Id.* In connection with these disapprovals, EPA also disapproved portions of several SIP revisions submitted by Texas for the purpose of addressing the requirements of the Act regarding interference with other states' programs for visibility protection.² *Id.*

EPA issued a FIP, establishing a new long-term strategy for Texas. The strategy consisted of SO₂ emission limits for 15 coal-fired EGUs at

² Amendatory text reflecting these disapprovals was added to 40 C.F.R. § 52.2304(d). 81 Fed. Reg. at 352.

eight power plants that significantly affect visibility at the Wichita Mountains Wildlife Refuge, Big Bend National Park, and Guadalupe Mountains National Park. *Id.* at 351-52. EPA required SO₂ scrubber upgrades at facilities with existing scrubbers, and scrubber retrofits at facilities without existing scrubbers. *Id.* at 305. EPA established new Progress Goals for 2018 for Big Bend, Guadalupe Mountains, and Wichita Mountains that accounted only for the emission reductions from the scrubber upgrades, which EPA projected would be installed by the end of 2018, but not the scrubber retrofits, for which EPA allowed five years. *Id.* at 347.

EPA issued the proposed rule in December 2014, after the CAIR rule was vacated. EPA did not finalize its proposal to satisfy the BART requirement for Texas' EGUs by relying on CSAPR, stating that, in light of the uncertainties created by the D.C. Circuit's July 2015 remand, "we have concluded that it would not be appropriate to finalize our proposed determination to rely on CSAPR as an alternative to SO₂ and NO_x BART for EGUs in Texas at this time." *Id.* at 302. EPA stated that it would "address the question of appropriate SO₂ and NO_x BART limits for EGUs in a future rulemaking." *Id.* at 316.

C. Progress of the Litigation

On March 1, 2016, the State of Texas, the Public Utility Commission of Texas, and the Texas Commission on Environmental Quality (collectively “Texas”) filed a petition for review of the “Texas applicable portions” of the Final Rule in this Court. Parties ultimately added as petitioners include Luminant Generation Company, L.L.C.; Big Brown Power Company, L.L.C.; Luminant Mining Company, L.L.C.; Big Brown Lignite Company, L.L.C.; Luminant Big Brown Mining Company, L.L.C.; Southwestern Public Service Company; Utility Air Regulatory Group; Coletto Creek Power, L.P.; NRG Texas Power, L.L.C.; and Nucor Corporation. On March 28, 2016, the Court granted motions to intervene filed by IBEW Local Union 2337 in support of petitioners and by Sierra Club and National Parks Conservation Association in support of EPA.³ At approximately the same time this petition for review was filed in the Fifth Circuit, all of the petitioners here also filed petitions for

³ The Court combined all petitions under Case No. 16-60118.

review challenging the Final Rule in the District of Columbia Circuit,⁴ and certain of the petitioners filed similar actions in the Tenth Circuit.⁵

On March 3, 2016, petitioners Luminant Generation Company, L.L.C., Southwestern Public Service Company, and Coletto Creek Power, LP, filed a “Joint Motion to Stay Final Rule of the U.S. Environmental Protection Agency” (“Utilities’ Stay Motion”), which sought a stay of the Final Rule and an order tolling all compliance deadlines included in the Final Rule pending resolution of this case. On March 17, 2016, Texas filed its motion (“Texas Stay Motion”), seeking the same relief. EPA filed a “Consolidated Response in Opposition to the Motions for Stay of the Final Rule” on April 7, 2016, and both the Utilities movants and Texas filed separate reply briefs on April 18, 2016.

⁴ *State of Texas, et al. v. EPA*, No. 16-1078 (consolidated with Nos. 16-1083, 16-1084, 16-1085, 16-1086, 16-1087, and 16-1091). On August 30, 2016, the clerk issued an order holding the D.C. Circuit cases in abeyance pending settlement negotiations, with the parties directed to file an abeyance status report by November 28, 2016.

⁵ *Luminant Generation Company, et al. v. EPA*, No. 16-508, with consolidated cases Nos. 16-9509, 16-9511, and 16-9512. On September 22, 2016, the Tenth Circuit issued an order holding the consolidated petitions for review there in abeyance, with a status report due from the parties by November 28, 2016.

In the meantime, on March 22, 2016, EPA filed a “Motion to Dismiss or, in the Alternative, Transfer to the D.C. Circuit” (“Transfer Motion”) in this Court. EPA argued that under the CAA’s judicial review provision, 42 U.S.C. § 7607(b)(1), “jurisdiction for review of all final actions that EPA finds are ‘based on a determination of nationwide scope or effect,’ and for which EPA publishes such a determination, rests exclusively in the D.C. Circuit.” Transfer Motion at 1. On April 18, 2016, petitioners filed a joint opposition to EPA’s Transfer Motion, and EPA filed a reply brief in support on April 28, 2016.

The motions panel rendered an opinion on July 15, 2015, which concluded that:

Because the Clean Air Act gives jurisdiction over petitions for review to the courts of appeal generally and because the Act’s forum selection clause designates the regional circuit as the appropriate venue for the challenge, we DENY EPA’s motion to dismiss or transfer. Because Petitioners have demonstrated a strong likelihood of success on the merits, because they are likely to suffer irreparable injury in the absence of a stay while EPA has not shown similar injury from the issuance of a stay, and because the public interest weighs in favor of a stay, we GRANT the motion for a stay pending resolution of the petitions for review on the merits.

Order at 2.

The Court found that, in order to show a strong likelihood of success on the merits, the petitioners were required to show that EPA

acted arbitrarily, capriciously, or unlawfully. *Id.* The panel noted that “[o]ur determination of Petitioners’ likelihood of success on the merits is for the purposes of the stay only and does not bind the merits panel.” *Id.* n.29.

The Court stated that petitioners had alleged two grounds for why EPA’s disapproval of the Texas SIP was unlawful: “(1) that EPA exceeded its powers when it disapproved Texas’s reasonable progress goals and the resulting long-term strategy despite their compliance with the Clean Air Act; [and] (2) that EPA acted arbitrarily and capriciously when it disapproved Texas’s consultation with Oklahoma.” *Id.* at 27.

The Court stated that petitioners had alleged three independent grounds why the FIP was unlawful: (1) that the FIP “impermissibly relied on effects outside the ten-year regulatory window in requiring emission controls”; (2) that FIP did not adequately consider costs; and (3) that the FIP did not adequately consider the effects on “grid reliability” in Texas. *Id.* at 27-28.

With regard to Progress Goals, the Court stated that “EPA disapproved both Texas’s and Oklahoma’s goals by arguing that Texas incorrectly weighed the four statutory factors that govern the development of reasonable progress goals” set forth in 42 U.S.C. §

7491(g)(1). Order at 30. The Court said that, while EPA asserted that it had several grounds for disapproving the Progress Goals, “[m]ost of these ‘independent’ grounds boil down to EPA’s insistence that Texas should have conducted a source-specific requirement,” *id.*, and that no ground except lack of source-specific analysis and estimation of natural visibility conditions was cited in the Final Rule. *Id.* at 30-31. The Court found that “EPA’s requirement that Texas conduct a source-specific analysis is not supported by the Clean Air Act or the Regional Haze Rule.” *Id.* at 31. Consequently, the Court held that “Petitioners are likely to establish that EPA improperly failed to defer to Texas’s application of the statutory factors and improperly required a source-specific analysis not found in the Act or Regional Haze Rule.” *Id.*

With regard to EPA’s disapproval of the consultations between Texas and Oklahoma regarding interstate effects of pollution on visibility in Class I federal areas, the Court stated that “EPA’s disapproval seems to stem in large part from its assertion that Texas had to conduct a source-specific analysis and provide Oklahoma with that source-specific analysis.” *Id.* at 32. The Court found that

Given the absence of a regulation or statute requiring source-specific consultations, the extent of negotiations between CENRAP states [the regional planning association], the

volume of analysis produced by CENRAP, and the fact that EPA has never before disapproved the consultation between states under the Regional Haze Rule, Petitioners have a strong likelihood of success in showing that EPA's disapproval of the consultation between Oklahoma and Texas was arbitrary and capricious.

Id. at 33.

The Court also held that "Petitioners have a strong likelihood of showing that EPA acted in excess of its statutory power when it disapproved the Texas [SIP] for failing to require scrubbers that will not be installed until after the [SIP] is no longer in effect," that is, after 2018.

Id. at 35. According to the Court, "EPA bound states (and accordingly bound itself) to a ten-year window when it promulgated the Regional Haze Rule," *id.* at 34, and EPA does not have authority to require actions that would take place after the particular period.

As to petitioners' claims that EPA did not adequately consider costs of the FIP's required changes to power plants, particularly scrubbers, the Court said that it need not consider whether EPA improperly used a dollars per ton of reduced pollution metric versus a dollars per deciview improvement metric "or whether the costs imposed are unreasonable as a whole in light of the minimal visibility benefits the FIP would achieve in the relevant time period," because

petitioners have a strong likelihood of establishing other flaws in the FIP. *Id.* at 36.

Finally, the Court held that “EPA’s truncated discussion of [electric power] grid reliability indicates that the agency may not have fulfilled its statutory obligation to consider the energy impacts of the FIP.” *Id.* at 39.

The Court found that petitioners had demonstrated that they would suffer irreparable injury if the effect of the Final Rule was not stayed pending litigation of this petition for review, *id.* at 40-42, that a stay would not injure EPA or Intervenor-Respondents, *id.* at 42-43, and that “the public’s interest in ready access to affordable electricity outweighs the inconsequential visibility differences that the federal implementation plan would achieve in the near future.” *Id.* at 43.

The Court stayed “the Final Rule in its entirety, including the emissions control requirements, pending the outcome of this petition for review.” *Id.* at 44.

ARGUMENT

I. Standard for Granting Voluntary Remand

Through this motion, EPA seeks an order of the Court granting a voluntary remand of those portions of EPA’s Final Rule disapproving the

Texas and Oklahoma SIPs and imposing FIPs. EPA does not oppose continuation of the current stay pending appeal through the completion of agency action on reconsideration pursuant to the requested remand. In addition, EPA requests that the Court lift the current stay pending appeal as to those portions of the Final Rule not challenged by petitioners in these petitions for review, *i.e.*, EPA's approval of portions of the Texas regional haze SIP and one portion of the Oklahoma regional haze SIP. See fn. 1, *supra*.

“A reviewing court has inherent power to remand a matter to the administrative agency.” *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983). “[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.” *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002); *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (noting that “the power to decide in the first instance carries with it the power to reconsider”). This authority includes the right to seek voluntary remand of a challenged agency decision, without confessing error. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (*quoting SKF USA Inc.*). For example, an agency

may seek remand because it wishes to reconsider its interpretation of the governing statute, the procedures it followed in making its decision, or the decision's relationship to other agency policies. *Id.* If an agency has not provided a "reasoned explanation" for its action, "it is appropriate to remand to the agency for further proceedings." *Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1201 (10th Cir. 2001).

While the reviewing court has discretion whether to remand, voluntary remand is appropriate where the request is reasonable and timely. *Macktal*, 286 F.3d at 826. "Administrative reconsideration is a more expeditious means of achieving . . . agency policy than is resort to the federal courts." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). As the D.C. Circuit has stated, "[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *see also Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance

pending reconsideration by the agency”). “[I]f the agency’s concern is substantial and legitimate, a remand is usually appropriate.” *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004). “Generally, courts only refuse voluntarily requested remand when the agency’s request is frivolous or made in bad faith.” *Calif. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

II. The Court Should Grant EPA’s Motion for Voluntary Remand

In light of the Court’s Order finding that petitioners have shown a strong likelihood that they would succeed on the merits of their claims, as well as EPA’s determination that reconsideration of the deferral of action on BART in the Final Rule is warranted, as described below, EPA moves the Court to grant a motion for voluntary remand of those portions of the Final Rule disapproving the Texas and Oklahoma SIPs and promulgating the FIPs. While the Court indicated that its finding on likelihood of success on the merits does not bind a subsequent merit panel’s consideration of the issues, EPA has reviewed the Court’s Order and determined that it wishes to re-examine its disapproval of the Texas and Oklahoma SIPs and issuance of FIPs. A voluntary remand would allow the Agency to take a second look at the Final Rule and determine

whether another course of action is appropriate. Thus, a remand would result in judicial economy and conservation of the parties' resources by obviating the need for arduous and unnecessary briefing.⁶

EPA's concerns leading to this request for approval of a voluntary remand are "substantial and legitimate." *Citizens Against Pellissippi Parkway*, 375 F.3d at 417. Petitioners' motions for stay and the Court's Order demonstrate that the Final Rule could be found arbitrary and capricious or contrary to law. Consequently, EPA believes that it is appropriate to reconsider the Final Rule, provide interested parties with a new opportunity to provide comment, including with respect to the views expressed in the Court's Order, and issue a new rule that takes into account the comments received and any changed factual circumstances that could warrant different outcomes.

In addition, on March 2, 2016, petitioner Luminant submitted a request for administrative reconsideration of the Final Rule pursuant to 42 U.S.C. § 7607(d)(7)(B). Exhibit A. Among other things, Luminant

⁶ Judicial economy would extend to the other Courts of Appeals. If the motion is granted, EPA would cite the Court's remand order here in seeking to dismiss the petitions for review in the Tenth and D.C. Circuits, preventing undue duplication of proceedings.

argued that reconsideration is appropriate because EPA did not finalize its proposal to rely on CSAPR to satisfy BART for Texas EGUs, but nonetheless finalized the Agency's proposed long-term strategy and Progress Goals for Texas. Luminant stated that "[b]y deferring this action, EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated." *Id.* at 2. Luminant claimed that the ultimate decision was not discussed in the proposed rule and that the public was therefore unable to comment on the change. *Id.*

EPA has determined that reconsideration of the Agency's decision to finalize a long-term strategy and Progress Goals for Texas before determining BART for Texas EGUs is warranted, because (1) the public did not have an opportunity to submit comments on the reasonableness or lawfulness of this approach, and (2) EPA's forthcoming proposal on BART for Texas EGUs will likely change how reasonable progress is evaluated.⁷ This issue further supports voluntary remand to allow EPA

⁷ EPA is subject to a consent decree entered in *Sierra Club v. McCarthy*, Civ. Act. No. 11-548 (D.D.C.), which established a schedule by which EPA had to take action on a number of regional haze FIPS or SIPs, including those for Texas and Oklahoma. Consistent with the requirements of the most recent amendment to that consent decree, no later than December 9, 2016, EPA will sign a notice of proposed rulemaking in which the

to consider this objection to the Final Rule. EPA plans to grant reconsideration on the issue in the near future, and voluntary remand is appropriate to allow EPA to reconsider the Final Rule in light of the Agency's impending BART proposal.

This motion is also timely. On August 19, 2016, approximately one month after the issuance of the Court's Order, the Court granted the parties' joint stipulation to stay further proceedings in the case, to and including November 28, 2016, to allow the parties to pursue settlement negotiations. Unfortunately, settlement negotiations were not successful. EPA's motion for voluntary remand has been filed before petitioners were under any obligation to file their opening merits briefs, but after EPA has had the benefit of reviewing the Court's July 15, 2016, Order, and after settlement negotiations failed. EPA notified the parties of the possibility that it would file a motion for voluntary remand before the Clerk issued a briefing schedule, and this motion is being filed shortly after a briefing schedule was set.

Agency "proposes approval of a SIP; promulgation of a FIP; partial approval of a SIP and promulgation of a partial FIP; or approval of a SIP or promulgation of a FIP in the alternative, for Texas, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations." Order, ¶2(ii)(b) (Dec. 15, 2015).

As noted, EPA does not object to continue maintenance of the current stay pending appeal until the Agency's process on remand is complete. Because the Final Rule has been stayed since July 2016, and would remain so during the pendency of the remand, Petitioners will not be prejudiced by the timing of this motion for voluntary remand. In fact, the relief that would ordinarily be ordered if the petition for review were granted is a remand to EPA for reconsideration. Thus, petitioners are advantaged by EPA's request for a voluntary remand because they avoid the risk that EPA will prevail if this petition for review is litigated on the merits or successfully appealed. As the D.C. Circuit has stated, motions for voluntary remand are "commonly grant[ed]." *Ethyl Corp.*, 989 F.2d at 524.

If the Court grants the relief requested here, it should retain jurisdiction over the petition as to the remanded portions of the Final Rule and place the petition in abeyance during the pendency of the remand, so that the current stay pending appeal may be maintained.

III. The Court Should Lift the Stay Pending Appeal of Those Portions of the Final Rule That Partially Approved the Texas and Oklahoma SIPs and Have Not Been Challenged by Petitioners

The portions of the Final Rule challenged by petitioners are EPA's partial disapproval of the Texas and Oklahoma SIPs and the EPA's issuance of FIPs for Texas and Oklahoma. Through this motion, EPA seeks a voluntary remand of those actions. EPA's partial approval of portions of the Texas and Oklahoma SIPs is not disputed and was not cited as a reason for the imposition of the stay pending appeal. Because granting the motion for voluntary remand of the disapprovals and FIPs would resolve the claims asserted in these petitions for review, EPA respectfully requests that the undisputed portions of the Final Rule should be released from the terms of the stay imposed by the Court's Order of July 15, 2016. That is particularly the case because lifting the stay as to those aspects of the Final Rule would give effect to those portions of the proposed SIP submitted by the State of Texas that EPA has determined meet the requirements of the Clean Air Act.

CONCLUSION

For the reasons set forth above, EPA moves the Court to grant its request for voluntary remand of those portions of the Final Rule which

disapproved provisions of the Texas and Oklahoma SIPs, and issued FIPs for Texas and Oklahoma, for reconsideration by EPA in light of the Court's Order of July 15, 2016. EPA further requests that the Court lift the stay with regard to the portions of the Final Rule approving portions of the Texas and Oklahoma SIPs.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural
Resources Division

Dated: Dec. 2, 2016

By: David A. Carson
DAVID A. CARSON
DANIEL PINKSTON
Environmental Defense Section
Environment and Natural
Resources Division
U.S. Department of Justice
South Terrace, Suite 370
999 18th Street
Denver, CO 80202
(303) 844-1349
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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)(2)(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Cambria, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5174 words, excluding the caption and signature blocks, according to the count of Microsoft Word.

/s/ David A. Carson

DAVID A. CARSON

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONDENTS' MOTION FOR PARTIAL VOLUNTARY REMAND** by Notice of Electronic Filing using the Court's CM/ECF system, which will send notice of such filing via email to all counsel of record.

Said filing was made on or before the date set forth below.

Dated: Dec. 2, 2016

By: /s/ David A. Carson
Environmental Defense Section
United States Department of Justice



Stephanie Zapata Moore
Vice President & General Counsel
stephanie.moore@luminant.com

Luminant
1601 Bryan St.
Dallas, Texas 75201

T 214.875.8183
C 214.542.6460
F 214.875.9478

March 2, 2016

Sent Via: U.S. Mail and electronic mail

The Honorable Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: **Request for Reconsideration of EPA's Final Rule titled "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" (81 Fed. Reg. 296 (Jan. 5, 2016) (Docket No. EPA-R06-OAR-2014-0754)**

Dear Administrator McCarthy:

Luminant Generation Company LLC ("Luminant") respectfully requests that the U.S. Environmental Protection Agency ("EPA") grant reconsideration of the final rule titled *Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze*. See 81 Fed. Reg. 296 (Jan. 5, 2016). Luminant commented on the proposed rule and has a substantial interest in the outcome of the final rule. Luminant owns and operates 9 of the 15 units that are directly regulated by the final rule, and because of the emission limitations in the final rule, Luminant is required to install over \$1 billion in pollution controls at these units.

Luminant requests that EPA convene a proceeding pursuant to 42 U.S.C. § 7607(d)(7)(B) to reconsider new aspects of the final rule. Under the Clean Air Act, the Administrator "shall convene a proceeding for reconsideration of the rule" if the person raising the objection demonstrates that: (1) "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) ;" and (2) "such objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). EPA must "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.*

As outlined below, it was not possible for Luminant to raise certain objections during the comment period, and each of these objections is of central relevance to the outcome of the final rule. Because both prerequisites are met, EPA "lack[s] discretion not to address the claimed errors." *North Carolina v. EPA*, 531 F.3d 896, 927 (D.C. Cir. 2008).

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- **Synapse Report:** EPA contracted Synapse Energy Economics, Inc. (“Synapse”) to review a 2014 report issued by the Electric Reliability Council of Texas (“ERCOT”)¹ that addresses reliability issues associated with EPA’s regional haze proposal. The Synapse report was not submitted to EPA until September 8, 2015, nearly five months after the public comment period for the proposed regional haze rule was closed. EPA did not indicate in the proposal that it was considering hiring a contractor for this purpose. EPA has specifically relied on the Synapse report in the final rule to reject public comments regarding reliability issues. See 81 Fed. Reg. at 345 (“We reviewed and accept [Synapse’s] finding and adopt its conclusion that ERCOT’s report contained significant flaws. In sum, ERCOT’s report cannot support a determination that there is likely to be any significant, adverse effect on the supply, distribution, or use of energy.”). Reconsideration is warranted given EPA’s express reliance on the Synapse report—which was issued well after the comment deadline—to dismiss valid reliability concerns.
- **October 2015 ERCOT Study :** ERCOT, which ensures that the electric grid in Texas remains reliable, issued an updated report in October 2015 regarding reliability issues associated with EPA’s regional haze proposal.² The Synapse report was submitted to EPA in September 2015, and therefore, does not consider ERCOT’s updated findings regarding reliability. The final rule itself also does not acknowledge ERCOT’s October 2015 report. EPA must fully account for ERCOT’s updated assessment regarding regional haze before issuing a final rule. Relatedly, in the final rule, EPA asserts that its reliability analysis was based on its conclusion that the rule “should not require a source to shut down to comply.” Response to Comments at 162. This is a new determination by EPA and must be subject to notice and comment through the reconsideration process.
- **New Reasonable Progress Goals for 20% Best Days:** EPA’s final regional haze rule includes new reasonable progress goals (“RPGs”) for the 20% best days. In the final rule, EPA has quantified the RPGs as 5.70 dv at the Guadalupe Mountains National Park, 5.59 dv at Big Bend National Park, and 9.22 dv at Wichita Mountains National Wildlife Refuge. 81 Fed. Reg. at 306–07. EPA’s proposed rule, however, quantified RPGs for only the 20% worst days. EPA’s proposed rule was fundamentally flawed by not including proposed numerical values for the 20% best days, and therefore, EPA must consider public input on the newly calculated RPGs.
- **CSAPR/BART:** In the proposed rule, EPA stated that it would “replace Texas’ reliance on CAIR to satisfy the BART requirement for EGUs with reliance on CSAPR.” 79 Fed. Reg. 74,818, 74,823 (Dec. 16, 2014). Instead of finalizing this approach, EPA changed course and decided that “it would not be appropriate to finalize [its] proposed determination to rely on CSAPR as an alternative to SO₂ and NO_x BART for EGUs in Texas at this time.” 81 Fed. Reg. at 302. This proposed course of action was not discussed in the proposed rule, and thus it was not possible to comment on EPA’s deferral. By deferring this action, EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated. EPA must seek public comment on this fundamental difference between the proposed rule and final rule.

¹ ERCOT, *Impacts of Environmental Regulations in the ERCOT Region* (Dec. 16, 2014), <http://www.ercot.com/content/news/presentations/2014/Impacts%20of%20Environmental%20Regulations%20in%20the%20ERCOT%20Region.pdf>.

² ERCOT, *Transmission Impact of the Regional Haze Environmental Regulation* (Oct. 15, 2015), http://www.ercot.com/content/wcm/key_documents_lists/76860/Transmission_Impact_of_the_Regional_Haze_Environmental_Regulation__Oct_RPG.pdf.

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- **EPA's Interpretation of the Clean Air Act** : In EPA's response to comment document, it claims that visibility benefit is "a consideration within the cost factor ." Response to Comments at 84, 88. This interpretation of the reasonable progress statutory factors, however, is at odds with EPA's proposed rule. Although EPA previously stated that "visibility is not an explicitly listed factor to consider when determining whether additional controls are reasonable," TX TSD at 18, EPA did not state that it was interpreting "visibility" as a component of the statutory cost factor. EPA's disagreement with the Federal Land Managers, who warned EPA that it has no "statutory mandate" to consider visibility,³ is also a new finding and new aspect of EPA's final action. EPA's newly developed interpretation of the cost factor is grounds for reconsideration.

Luminant was not given the opportunity to raise any of the foregoing issues during the public comment period. Due to the central relevance of these issues to the final rule, reconsideration is required under 42 U.S.C. § 7607(d)(7)(B).

Finally, we also request that EPA reconsider its denial of Luminant's request for a stay of the effective date of the rule and its compliance deadlines pending judicial review. Luminant previously requested that EPA stay the rule pending judicial review, but EPA denied that request in its final action. 81 Fed. Reg. at 315. In light of the issues raised above and the reconsideration proceedings that are necessary, Luminant again requests that EPA reconsider its denial and grant a stay of the rule and its requirements.

Please contact me with any questions regarding this request for reconsideration.

Sincerely,



Stephanie Zapata Moore
General Counsel, Luminant

cc: Janet McCabe
Ron Curry

³ USDA Forest Serv., *Recommendations for Improved Implementation of the Regional Haze Program 5* (May 2014), http://www.wrapair2.org/pdf/Final_RHR_USFS%20Improvement%20Suggestions%20May%202014.pdf.

Ms. Stephanie Zapata Moore
Vice President & General Counsel
Luminant Generation Company LLC
1601 Bryan Street
Dallas, Texas 75201

Dear Ms. Zapata Moore:

I am responding to the March 2, 2016, petition you filed on behalf of the Luminant Generation Company LLC (Luminant) requesting that the Environmental Protection Agency grant reconsideration of the final rule titled, “Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze,” published January 5, 2016 (81 FR 295) (Final Rule).

As you know, to comply with the Clean Air Act’s (CAA) reasonable progress mandate, the EPA partially disapproved Texas’s regional haze state implementation plan and finalized sulfur dioxide emission limits for nine electric generating units owned and operated by Luminant—Big Brown Units 1 and 2; Martin Lake Units 1, 2, and 3; Monticello Units 1, 2, and 3; and Sandow Unit 4. These emission limits were based on the performance of flue gas desulfurization retrofits or upgrades. Luminant’s petition seeks reconsideration and an administrative stay of the Final Rule pursuant to section 307(d)(7)(B) of the CAA. Among other things, Luminant asserts that the EPA proposed to rely on the EPA’s Cross-State Air Pollution Rule to satisfy the CAA’s Best Available Retrofit Technology (BART) requirement, but did not finalize this aspect of the proposal. Luminant asserts that, by deferring action on BART, “EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated.” Petition at 2.

In response to your petition, I am granting reconsideration of the Final Rule. At this time, we are not acting on your request for a stay because the United States Court of Appeals for the Fifth Circuit has already issued a judicial stay of the Final Rule.

If you have questions regarding this petition response, please contact Suzanne Smith at (214) 665-8027.

Sincerely,

Gina McCarthy

To: Walker Williamson[walker.williamson@tceq.texas.gov]; 'Kristin Patton'[Kristin.Patton@tceq.texas.gov]; donna.huff@tceq.texas.gov[donna.huff@tceq.texas.gov]; 'Vincent Meiller'[vincent.meiller@tceq.texas.gov]

Cc: Walser, John[Walser.John@epa.gov]; Stanton, Marya[Stanton.Marya@epa.gov]; Fuerst, Sherry[fuerst.sherry@epa.gov]; Salem, Nevine[Salem.Nevine@epa.gov]; Donaldson, Guy[Donaldson.Guy@epa.gov]; Wiley, Adina[Wiley.Adina@epa.gov]; Paige, Carrie[Paige.Carrie@epa.gov]; Medina, Dayana[Medina.Dayana@epa.gov]; Riley, Jeffrey[Riley.Jeffrey@epa.gov]; Jacques, Wendy[Jacques.Wendy@epa.gov]; Todd, Robert[Todd.Robert@epa.gov]; Donaldson, Tracie[donaldson.tracie@epa.gov]; Pitre, Randy[Pitre.Randy@epa.gov]; Vaughn, Gloria[Vaughn.Gloria@epa.gov]; Boyce, Kenneth[boyce.kenneth@epa.gov]; Imhoff, Robert[imhoff.robert@epa.gov]; Nann, Barbara[nann.barbara@epa.gov]; Smith, Suzanne[Smith.Suzanne@epa.gov]; Watson, Lucinda[Watson.Lucinda@epa.gov]

From: Young, Carl

Sent: Wed 12/14/2016 11:07:46 PM

Subject: Materials for the December 15 TCEQ/EPA SIP monthly call (2:00 to 3:00; 866-299-3188, access code Ex. 6 - Personal Privacy)

[Agenda for 12-15-2016 call.docx](#)

[Action Items from 11-17-2016.docx](#)

[R6 Active TX SIPs with colors 12-14-2016.xlsx](#)

Attached please find materials for the December 15 call. These include the:

- Agenda
- Action item tracking table
- Updated list of active Texas SIPs with color codes

Talk with you on Thursday.

Carl

Carl Young

EPA Region 6 Air Quality Program

(214) 665-6645

Action Items from 11/17/16 TCEQ/EPA SIP Call

Date	Item	Lead	Resolution
9/18/14	EPA to provide update on modeling guidance for 2008 ozone standard/When does EPA expect to finalize guidance	EPA	Ongoing. Draft for stakeholder comment released in December 2014 (http://epa.gov/ttn/scram/) with comments due in March 2015. Target for revised final is now Winter 2016.
11/17/16	EPA to check on SO2 designations date for 4 Texas areas	EPA	Email sent 11/17/16: EPA does not expect additional time for designation decisions for the 4 Texas areas. The date for a decision is November 29. The final rule on the decisions was published 12/13/16.

**Agenda: TCEQ/EPA SIP Monthly Call; December 15, 2016, 2:00 – 3:00;
866-299-3188, access code**

Ex. 6 - Personal Privacy

Introductions

Goals of the Monthly Calls – EPA

- Status updates
- Identify issues for separate followup calls
- Identify action items for followup

Texas Regional Haze Proposal – EPA

Update on Houston Reclassification – EPA, TCEQ

DFW SIP Update – EPA

Houston and DFW 8-hour Ozone Data – EPA

Site	2015 4 th (ppb)	Preliminary 2016 4 th (ppb, through 11/16/2016)	2017 4 th Needed for 2008 O3 NAAQS (ppb)
Houston Aldine (48-201-0024)*	95	74	58
DFW Denton Co. Airport (48-121-0034)**	88	76	63

* Since 1986 the lowest 4th high recorded at the Aldine site is 68 ppb from 2014. For 2016 other Houston and DFW monitors have 4th high values greater than 75 ppb.

** Monitor has operated since 1998; the lowest 4th high recorded at the Denton County Airport site is 74 ppb from 2010

Recent and Upcoming EPA Actions – EPA

- Proposal for the 2015 Ozone NAAQS SIP Requirements Rule published 11/17; webinar held 12/7
- Final rule for DFW RFP SIP published 12/7
- Proposal for Regional Haze and BART signed 12/9
- Notice of proposed consent decree for Finding of Failure to Submit Ozone Nonattainment SIPs published 12/9
- Final rule for SO₂ designations for four areas: (Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County) published 12/13
- Notice on the extension of the comment period and public hearing on 2015 Ozone NAAQS SIP Requirements Rule proposal signed 12/13
- Final rule for Houston reclassification published 12/14
- Direct final rule for the Frisco Pb NAAQS SIPs
- Proposal for 1997 and 2006 PM_{2.5} NAAQS transport SIPs
- Proposal for DFW NO_x RACT
- Proposal for 2012 PM_{2.5} infrastructure SIP

Recent and Upcoming TCEQ Actions – TCEQ

- 30 TAC 114 Clean-up and Repeal of the VAVR Program – Adopted December 7
- HGB 2008 Ozone AD and RFP SIP Revisions – Adopted December 15
- VOC Storage Tank RACT Update Rule – Adopted December 15
- Rule Petition for 30 TAC 111.149(b) – Considered December 15
- 30 TAC 111.203 and 111.217 Outdoor Burning Rules – Proposal January 18
 - This rule project is managed by TCEQ's Office of Compliance and Enforcement

Action Item Update

Other Items/Late Breaking News

Current Action Items

Next Call – January 19, 2 to 3 (Third Thursday)

From: Donaldson, Guy
Location: R6-ConfRm-Gulf of Mexico-11002/R6---11th-Floor
Importance: Normal
Subject: Texas Regional haze
Start Date/Time: Thur 4/6/2017 4:30:00 PM
End Date/Time: Thur 4/6/2017 5:30:00 PM

Call in number 866-299-3188 Pass Code Ex. 6 - Personal Privacy

To: Wiley, Adina[Wiley.Adina@epa.gov]; Robinson, Jeffrey[Robinson.Jeffrey@epa.gov]
From: Donaldson, Guy
Sent: Fri 3/17/2017 2:44:43 PM
Subject: FW: Tx trading, Request for Parallel Process Review
EBT Par Process March 2017.pdf
2016_041_101-AI Emissions Banking and Trading Revisions for Area and Mobile Source Credit
Generation.pdf

From: Stenger, Wren
Sent: Monday, March 13, 2017 7:50 AM
To: Donaldson, Guy <Donaldson.Guy@epa.gov>; Stanton, Marya <Stanton.Marya@epa.gov>;
Riley, Jeffrey <Riley.Jeffrey@epa.gov>
Subject: Tx trading, Request for Parallel Process Review

FYI

From: Donna Huff [<mailto:donna.huff@tceq.texas.gov>]
Sent: Friday, March 10, 2017 2:22 PM
To: Stenger, Wren <stenger.wren@epa.gov>
Cc: Donaldson, Guy <Donaldson.Guy@epa.gov>; Guy Hoffman
<guy.hoffman@tceq.texas.gov>; Daphne McMurrer <Daphne.Mcmurrer@tceq.texas.gov>;
David Brymer <david.brymer@tceq.texas.gov>; Amy Browning
<amy.browning@tceq.texas.gov>; Kim Herndon <Kim.Herndon@tceq.texas.gov>; Joyce
Spencer-Nelson <Joyce.Spencer-Nelson@tceq.texas.gov>; Wiley, Adina
<Wiley.Adina@epa.gov>; Robinson, Jeffrey <Robinson.Jeffrey@epa.gov>; Steve Hagle
<steve.hagle@tceq.texas.gov>
Subject: Request for Parallel Process Review

Wren,

The attached letter and proposed rule were mailed today to Mr. Coleman to request parallel processing. Please let us know if you have questions/concerns. We look forward to hearing from you and continuing our work together on this project.

Have a great weekend!

Donna

Donna F. Huff, Manager

Air Quality Planning

(512) 239-6628

How is our customer service? Fill out our online customer satisfaction survey at www.tceq.texas.gov/customersurvey.



The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§101.300, 101.302 - 101.304, 101.306, 101.370, 101.372 - 101.374, and 101.376.

If adopted, the amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

The Emissions Banking and Trading (EBT) program rules in Chapter 101, Subchapter H include market-based programs that provide sites with additional flexibility for complying with air regulations, such as the offset requirements in nonattainment new source review (NNSR) permits or the unit-specific emission limits in various state rules. Two of the EBT programs are voluntary programs designed to incentivize emissions reductions beyond regulatory requirements. In 1993, the commission adopted the emission reduction credit (ERC) rules in Subchapter H, Division 1 to allow sources in nonattainment areas to generate, bank, trade, and use credits from permanent reductions in emissions. In 1997, the commission adopted the discrete emission reduction credit (DERC) rules in Subchapter H, Division 4 to allow sources throughout the state to generate, bank, trade, and use credits from emission reductions that exceed regulatory requirements.

Because the programs are market-based, the costs associated with trades of credits are not controlled. In response to recent increases in the cost and lack of availability of

credits, there has been considerable interest from the regulated community for alternatives that facilitate credit generation and for flexibility in credit use, including options provided in the existing EBT rules that have historically not been used. Specifically, there has been interest in generating credits by reducing emissions from area (nonpoint) and mobile sources. However, staff research on the feasibility of generating area and mobile source credits indicated the need to address issues associated with ensuring that area and mobile source credits would meet EPA and Federal Clean Air Act (FCAA) requirements.

As part of a prior rulemaking, based on the identified implementation issues, on December 10, 2014, the commission proposed to remove the provisions for generating ERCs and DERCs from area and mobile sources. The commission requested comment on the proposed removal and the associated impacts of removing the potential for generation of area source credits. Additionally, the commission requested comment from individuals who support retaining an area source credit program specifically regarding suggestions for how an area source ERC or DERC program could be implemented in a manner consistent with EPA and FCAA requirements and minimize the burden to applicants. The commission subsequently received significant public comment opposing the removal of these area and mobile source credit provisions and, although the commission asked for ideas for how we might implement the area or mobile source generation, none were received. At the June 3, 2015 agenda, the commission retained the rules that allow area and mobile sources to generate credits. The commission emphasized that significant issues remain with generating credits

from area and mobile sources in a manner consistent with federal requirements. In addition, the commission directed staff to identify potential viable options for generating credits from area and mobile sources or bring the issue back before them for potential removal. The commission also indicated that interested parties should engage with staff to discuss issues and potential options that would help to make retaining the area and mobile source generation of credits feasible. In meeting the commission's direction, staff worked with external parties, including the EPA, to identify a potentially viable solution for some area and mobile sources to generate credits. Staff also held open-participation meetings in July and December of 2016 to present potentially viable approaches for area and mobile sources credit generation. Input from the meetings and received comments were taken into consideration in developing the proposed rulemaking.

Generating Credits from Area Sources

To meet federal requirements, ERCs must be generated from emissions reductions that are demonstrated to be real, quantifiable, permanent, enforceable, and surplus to the SIP and all applicable rules, and DERCs must be generated from reductions that are real, quantifiable, and surplus to the SIP and all applicable rules. Though the existing rules allow an area source to generate emissions credits, the current methods for quantifying and authorizing area emissions make it challenging to demonstrate that the emissions reductions from area sources relied on for credits meet federal requirements.

Under the existing EBT rules, an area source is a stationary source that is not required to submit an annual emissions inventory (EI) under §101.10 based on the quantity of emissions from the source (e.g., an account that emits less than 10 tons per year (tpy) of volatile organic compounds or 25 tpy of nitrogen oxides in an ozone nonattainment area). Examples of area sources include, but are not limited to, upstream oil and gas production, small painting operations, gasoline stations, dry cleaners, and residential fuel combustion. Although emissions from individual area sources are relatively small, area sources are numerous enough to collectively emit significant quantities and must be accounted for in SIP planning and modeling. Area sources are too small and/or too numerous to be inventoried individually. For this reason, emissions from area sources are typically estimated using county level information such as population, emission factors, and activity or production data. County-level emission estimates pose difficulties in demonstrating that a particular emission reduction from area sources is surplus to the emissions in the SIP modeling.

To effectively implement an area source EBT program, area source applicants would be required to submit facility-specific emissions information with their application to be eligible to generate credits. To generate an ERC, an area source would be required to make the emissions reductions federally enforceable through permitting actions or other federally enforceable means. Many of these area sources are typically authorized with a permit by rule, which may not currently require registration. Satisfying these requirements may create a significant regulatory and financial responsibility for these area sources, which are typically small businesses. Additionally, processing and

modeling these individual sources would be extremely resource intensive due to the significant number of sources.

The commission is proposing to revise the rules to implement an area source program that is consistent with EPA and FCAA federal requirements. The commission requests comment on the proposed revisions and their potential impact on the generation of area source credits. Comments focusing on how the proposed area source program might influence specific industry types or sectors are also requested.

Generating Credits from Mobile Sources

The existing rules allow a mobile source to generate ERCs from emissions reductions that are demonstrated to be real, quantifiable, permanent, enforceable, and surplus to the SIP and all applicable rules, and DERCs from reductions that are real, quantifiable, and surplus to the SIP and all applicable rules.

Mobile sources are categorized as on-road and non-road sources. The on-road sources include automobiles, buses, trucks, and other vehicles traveling on local and highway roads. Non-road sources are any mobile combustion sources typically used off road, such as locomotives, marine vessels, off-road motorcycles, snowmobiles, lawn/garden equipment, and farm, construction, and industrial equipment.

The mobile source EI used in attainment demonstration SIP revisions relies on historical and future-year emission estimates. Since there are several million mobile

sources in the state, it is unrealistic to have source-specific emission estimates in the SIP for each one. Also, since there is no registration database for non-road equipment, it is impossible to obtain a comprehensive set of source-specific data such as individual equipment owners, hours of use, model years of new purchases, ages of in-use equipment, etc. Instead, the commission uses computer models, such as the EPA's Motor Vehicle Emission Simulator and Texas NONROAD, to estimate the emissions from mobile sources based on fleet-average characteristics. The models used account for emissions reductions from mobile sources that are subject to the EPA rules for engine manufacturers. For these sources, the future-year emission estimates are usually lower than the historical emissions because of the ongoing fleet turnover benefits from replacing older higher-emitting engines with newer lower-emitting units that meet more stringent standards. Proving that an emission reduction from a specific mobile source is surplus to the SIP and not accounted for through fleet turnover poses challenges for potential applicants.

Federal law allows only the EPA and the State of California to establish engine certification standards for mobile sources. In the 1990s, when the EBT rules were first adopted, it was feasible to generate ERCs and DERCs from mobile sources because California standards were more stringent than the EPA standards, and there was not a requirement for California-certified vehicles or equipment to be used in Texas. However, changes in federal emission standards have essentially aligned the EPA and California standards in regards to emissions certification for mobile sources. In addition, the burden of meeting on-road vehicle and non-road equipment emission

standards falls with the manufacturer and not the purchaser. As long as the vehicle or equipment met the standards in place at the time it was manufactured, the owner may operate it in most parts of Texas for years without demonstrating that the equipment consistently meets the original emissions certification standards, although annual emissions testing is required for certain on-road sources in some areas.

The commission is proposing to revise the rules to implement a mobile source program that addresses the legal and technical issues with generating credits from mobile sources. The commission requests comment on the proposed revisions and their potential impact on the generation of mobile source credits.

Meeting Federal Requirements: Surplus

The proposed rulemaking would revise the EBT Program rules in Chapter 101 to address the implementation issues associated with crediting emissions reductions from area and mobile sources. The proposed rules would ensure that area and mobile source credits are surplus to the emissions estimates used for SIP modeling by accounting for uncertainty in verifying the SIP emissions for an individual source. This uncertainty in verifying SIP emissions is produced by non-point EI estimation techniques, which do not quantify emissions on a source-level basis, and by mobile source fleet turnover assumptions used in the SIP.

The EPA requires source-specific integrity elements to be a part of any Economic Incentive Program, like the commission's EBT program (*See Improving Air Quality with*

Economic Incentive Programs EPA-452/R-01-001). During the development of the proposed rule amendments, questions were raised about what makes emissions surplus for purposes of generating emission credits. Surplus means that source-specific emissions reductions proposed for credit generation are not relied upon in the current SIP, or are not required by some other legal requirement, like a consent decree. Specifically, baseline emissions cannot exceed emissions in the most recent modeling in the attainment demonstration or the EI for other types of SIP revisions.

These emissions are represented in an attainment demonstration primarily in the EI. The EI can be broken down into the point source EI, the area (nonpoint) source EI, and the mobile source EI. Due to different requirements for the different types of sources, each EI is developed differently. Point sources are required to keep records and report their actual emissions for the point source EI on an annual basis to the TCEQ. The area source EI is developed from activity data, surveys, and population-based estimates; consequently, this EI has more general information about the types of area (nonpoint) sources located in the nonattainment area instead of source-specific information. The mobile source EI is developed from EPA models and refined by the state. The inputs for these models are developed from various contract activities and surveys. Just as in the area source EI, the mobile EI does not contain specific information about specific sources; rather it has more general information about the types of mobile sources located in the nonattainment area.

To generate credits, facilities must demonstrate that the achieved emissions

reductions are surplus to the emissions accounted for in the attainment demonstration (that they are "surplus to the SIP"). For facilities at point sources, this generally means the emissions that are reported to the commission and included in the EI that is used in the attainment demonstration modeling for the nonattainment area. Therefore, a facility at a point source may not generate a credit for more emissions than were included in the attainment demonstration EI for that particular facility. For area and mobile sources, however, the comparison is more complicated because these sources are not individually accounted for in the SIP EI. Instead, the commission has come up with strategies in this proposed rulemaking to address these issues.

For area and mobile sources, the proposed rule has a two-tiered system to provide flexibility for sources that may want to generate credits, while ensuring that any reductions used to generate credits are surplus to the SIP, as required. First, the proposed rule will limit the total amount of credits that are available from the represented area and mobile source inventories in the applicable nonattainment area. Reserving a portion of the area and mobile EI that will not be eligible for credit generation ensures that the commission does not issue credits in excess of emissions estimates utilized in the SIP. The second tier requires the total amount of credits an individual area or mobile source can generate from their emission reduction to be adjusted based on the reduction strategy and the quality of emission estimation data. This accounts for the uncertainty in area and mobile source emission estimates as well as potentially different recordkeeping and reporting requirements for these sources. Unlike point sources, area sources (as defined in the EBT rules) and mobile sources do

not have to report annual emissions to the commission. Additional requirements are being instituted for mobile sources, which have an inherently limited useful life that is already specifically accounted for in the mobile source EI through factors such as fleet turnover, which ultimately result in future emissions reductions.

Meeting Federal Requirements: Real, Permanent, Enforceable, and Quantifiable

The proposed rules would ensure that the reductions used to generate area and mobile source credits are real by restricting credit generation from inelastic sources (i.e., gas stations, dry cleaners, restaurants, etc.) and disallowing credit generation from certain activities that do not result in actual emissions reductions, such as the replacement of a mobile source that is not capable of being operated as intended. To account for the potential overall increase in nonattainment area emissions from shifting activity to meet market demand vacated by a source that generated credits, the proposed rules also require an adjustment to the issued credits. The proposed rules would ensure that the reductions used to generate area and mobile source credits are permanent and enforceable by requiring that credited reductions are certified through federally enforceable agency documentation processes. The proposed rules would ensure that area and mobile source credits are quantifiable by accounting for the uncertainty in the emission calculation techniques proposed for area and mobile sources.

Section by Section Discussion

General Revisions

The commission proposes grammatical, stylistic, and other non-substantive changes to

update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the Texas Legislative Council Drafting Manual, August 2016. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble. The commission is requesting comment on any instance where these proposed non-substantive corrections would inadvertently change the requirements in the commission's existing rules.

Division 1: Emission Reduction Credit Program

§101.300, Definitions

An amendment to §101.300(4), the definition for "Baseline emissions," is proposed for more consistent use of terminology. The proposed amendment would conform the definition to the program's current practice of assessing credit generation possibilities based on the emissions reduction at a particular facility.

The definition for emission reduction at §101.300(9) is proposed to be modified for clarity.

The definitions for Historical adjusted emissions, "Mobile emission reduction credit," "Mobile Source," and "Mobile source baseline emissions" at §101.300(14) - (16) and §101.300(18), respectively, are proposed to be amended to facilitate program implementation by increasing consistency in the procedures used for stationary and mobile sources. The revised definition for historical adjusted emissions would apply to

both stationary and mobile sources. The revised definition for mobile emission reduction credit (MERC) requires that MERCs be expressed in tenths of a tpy and allows MERCs to be generated from groups of mobile sources. A mobile source is defined as any source included in the agency EI under the mobile source category, and mobile source baseline emissions are defined as the lowest of the source's historical adjusted emissions or SIP emissions.

A definition of "Point source" is proposed to be added as §101.300(21) to specify sources that are not area or mobile. A point source is defined as any facility included in the agency's EI under the point source category.

A definition of "Primarily operated" is proposed to be added as §101.300(22) to specify how to determine when a mobile source is operated often enough in a specific nonattainment area for reductions to be creditable. To provide operators some flexibility while still focusing program activity on sources that impact the relevant air shed, mobile sources are proposed to be considered primarily operated in a specific nonattainment area if at least 85% of their activity occurs in that area. The commission seeks comment on this and possible other approaches for addressing that mobile sources eligible for generating credits be primarily operated within the relevant nonattainment area.

A definition for "Projection-base year" is proposed to be added as §101.300(23) to clarify the year in which a point source facility must be in operation in order to

potentially qualify to generate an emissions credit. The subsequent definitions would be renumbered accordingly.

At renumbered §101.300(26), the definition of "Real reduction" is proposed to be revised to clarify that reductions from the following are not creditable: lowering the permit allowable emission limit without a physical change or change in method of operation; shifting a vent gas stream, or other pollution or waste stream, to another site; a mobile source that is not capable of being operated as intended; or a change in the emissions factor or emissions calculation equation. The purpose for this proposed revision is to ensure that emissions from credited reductions are real and do not return to the air shed from the generating source or by redirecting the source of the emissions to another site.

At renumbered §101.300(30), the definition of "State implementation plan (SIP) emissions" is proposed to be replaced to clarify that the definition applies to facilities at point or area sources and to mobile sources. The proposed changes to this definition are not intended to alter how SIP emissions are determined for point sources, except in cases without an applicable SIP revision. For newly designated nonattainment areas, in the interim before a SIP revision has been submitted for that area, the SIP emission year would be the year of the National Emissions Inventory (NEI) most recently submitted to the EPA prior to that area's nonattainment designation. It should be noted that any credits generated prior to a SIP revision for a newly designated nonattainment area could potentially be devalued if the SIP submission for

that nonattainment area relies on a different emissions year.

The proposed changes would establish that, for area and mobile sources, SIP emissions are actual emissions in the year of the latest TCEQ-generated NEI used to support the applicable SIP revision. In addition, the definition of SIP emissions is proposed to be revised to specify that, for area and mobile sources, credits will only be generated for actual emissions from each source, as verified by records provided with the application. Emission credits will not be issued beyond the amount of actual emissions from a source during the latest NEI year used to support modeling in the applicable SIP revision, not to exceed any applicable local, state, or federal requirement, as calculated using the best available data. For example, the latest NEI year used to support SIP modeling for both the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) nonattainment areas is from 2014. Thus, the SIP emissions for an area or mobile source would be the source's actual emissions from Calendar Year 2014. As such, an area or mobile source must have been operational during 2014 to be eligible for credit generation under the current applicable SIP revision.

For the area, on-road mobile, and non-road mobile source categories, the commission proposes to reduce the total amount of SIP emissions eligible for credit generation to mitigate uncertainties associated with the emission estimates, which are generally not based on source-specific data. In practice, the commission would determine the SIP emissions available for potential credit generation by reducing the total value in the applicable SIP revision by: 25% for area (excluding residential) and non-road mobile

sources (75% of SIP emissions for these categories is available for credit generation); and 15% for the on-road mobile source category (85% of SIP emissions for this category is available for credit generation). After the initial set-aside is accounted for, the commission would make the pool of remaining emissions available for credit generation .

Finally, the SIP emissions definition is proposed to be revised to establish that the applicable SIP revision for determining the SIP emissions will be set in the order of SIP revisions listed in proposed §101.300(30)(B) and (E). This will facilitate program implementation by setting the applicable SIP revision for area and mobile sources in a manner that is consistent with the treatment of point sources.

§101.302, General Provisions

Amended §101.302(a)(1) and (2) is proposed to facilitate program implementation by increasing consistency in the procedures used for stationary and mobile sources as both types of emission credits (ERCs and MERCs) are proposed to be eligible for inter-pollutant trading as provided by §101.306(d).

Amended §101.302(b)(1) and (3) is proposed to clearly specify that facilities at both point and area sources are eligible to generate emission credits. Language is proposed to be added in §101.302(c)(1) - (3) to specify that the following types of sources cannot generate credits: residential sources; sources that do not have records to support approved or approvable methods to quantify emissions ; on-road mobile sources that

are not part of an industrial, commercial, nonprofit, institutional, or municipal/government fleet, and mobile sources that do not primarily operate within a specific nonattainment area; resulting in the subsequent requirements being relettered. These categories are proposed to be restricted from generating credits as these sources are not expected to meet the federal requirements regarding emissions reductions being real, surplus, and quantifiable. An exception is provided to the ineligibility requirement related to primarily operating in a specific nonattainment area to allow flexibility for generating credits from marine and locomotive sources that use capture and control emissions reduction systems.

Under proposed §101.302(c)(2), the types of records expected include documentation of the characteristics taken into consideration to estimate emissions, such as activity level, emission flow rate, pollutant concentration, etc. The approved or approvable methods required would include previously EPA-approved protocols or protocols submitted to EPA for approval under relettered §101.302(e).

Section 101.302(d)(1) and (2) is proposed to be revised to introduce the acronyms ERC and MERC in this section. To ensure creditable emissions reductions are surplus as required, language is proposed to be revised at relettered §101.302(d)(1)(C) and (2)(C) - (E) to specify, respectively, that individual facilities and mobile sources cannot generate credits unless the reduction occurred during or after the SIP emissions year and the sources were operated in the applicable nonattainment area during the SIP emissions year.

To ensure creditable emissions reductions are quantifiable as required, language is proposed to be added as §101.302(e)(1)(C) to specify that, except as specified in §101.302(e)(1)(A) and (B), the owner or operator of a source subject to 30 TAC Chapter 106 or a permit issued under 30 TAC Chapter 116 must use the required testing and monitoring methodologies that apply to its facilities to show compliance with the applicable requirements; resulting in the subsequent subparagraphs being relettered.

To facilitate efficient program implementation, language is added as proposed §101.302(f)(1) to specify that the minimum credit the commission will issue will be 0.1 tpy. An individual area source facility, aggregated fugitive emissions, or aggregated mobile sources (for the same pollutant and reduction date) incapable of generating at least 0.1 tpy of credit after all adjustments are applied cannot generate emission credits. It is also proposed that fugitive emissions or mobile source emissions aggregated to meet the requirement that emission reductions be certified for at least 0.1 ton per year must be represented on the same application and will have an application deadline and credit expiration date determined by the earliest emission reduction date among the aggregated sources.

Language is added as proposed §101.302(f)(2) to facilitate program implementation by increasing consistency in the procedures used for ERCs and MERCs. In §101.302(f)(3), a citation is updated to reflect proposed changes elsewhere in the rule.

To assist in facilitating efficient submittal and processing of credit applications language is added as proposed §101.302(g) to specify that, beginning January 1, 2018, all credit applications must be electronically submitted through the State of Texas Environmental Reporting System (STEERS) unless an applicant receives prior approval from the executive director for an alternative form of application submission, that the executive director may specify monitoring, testing, recordkeeping, or other requirements, and that the generator must comply with all conditions specified by the executive director once the credit is certified. The records required could include documentation of the characteristics taken into consideration to estimate emissions, such as activity level, emission flow rate, pollutant concentration, etc. For area and mobile sources without New Source Review permits, credit certification may be contingent upon implementation of monitoring, testing, recordkeeping, and reporting that would be documented and made federally enforceable as special conditions in an EBT certification form. Lack of compliance with a special condition documented in an EBT certification form constitutes a violation and could result in an enforcement action against the credit generator, including but not limited to, the need to provide additional emissions reductions to replace the voided emissions credits. For example, if an emissions credit is issued for the removal of a vehicle from a specific nonattainment area, and the vehicle is later discovered back in that area, the generator would be considered in violation of a federally enforceable special condition listed in their EBT certification. In this case, the generator could be liable to replace the emissions credits and potentially be subject to other penalties for noncompliance.

To ensure that creditable emissions reductions are permanent and enforceable as required, language is added as proposed to §101.302(i) to specify that records necessary to verify the certified emissions reduction must be kept for a minimum of five years. This is intended to include records associated with the credit generation application as well as any records required to demonstrate implementation of any monitoring, testing, or other special conditions included on an EBT certification. Maintaining these records is necessary to show on-going compliance with a credit-related special condition and the credit generator may be required to create records for the life of the reduction strategy. For example, an EBT certification may require on-going tracking of vehicle usage for the useful life of the credit-generating vehicle by the credit generator. The generator in this case would be required to maintain records of the vehicle usage for five years after the date each record was created. For records in conjunction with the ERC life being expanded to 72 months, the records associated with generating the ERC would be required to be kept for six years and this requirement would be annotated on the EBT certification.

A change in relettered §101.302(n)(2) is proposed to use consistent units throughout the rules and implement consistent requirements regarding emission credits being issued for no less than 0.1 tpy, which is proposed to apply after any adjustments.

§101.303, Emission Reduction Credit Generation and Certification

To ensure creditable emissions reductions are real and not associated with the shifting of activity from one source to another, language is added as proposed

§101.303(a)(2)(D). The proposed requirement would disallow credit generation from the shutdown of area source types that are inelastic, highly interchangeable, and driven by population needs. The assessment of what constitutes a source that is driven by population needs will consider characteristics such as, but not limited to, whether this type of source commonly closes when population declines in its vicinity or if this source ceased operations, would another source of this type open to meet population needs. This requirement is proposed for area sources because the regulatory requirements are potentially less stringent for the markets they serve. In many cases, there are more significant economic (capital cost) or regulatory (emission offset, registration requirements, etc.) requirements for markets served by point sources making it less likely that a new source will readily open (and re-introduce emissions) to meet market demand created from the closure of another source. Examples of source categories that the commission considers to be inelastic sources include gas stations, restaurants, dry cleaners, and concrete batch plants. However, the commission cannot provide an exhaustive list of all possible inelastic area sources at this time. The commission seeks comment on the types of sources that should not be eligible to generate credits due to their being inelastic in terms of population needs. Additionally, the commission acknowledges that owners of area sources need a reasonable means of knowing which area sources are eligible for credit generation and which are not. However, using the rulemaking process to include the list of inelastic sources that would not be eligible for credit generation and then amending that list as needed would be impracticable. Therefore, the commission proposes in subparagraph (D) that the executive director shall maintain a list of area sources considered to be inelastic

and not eligible for credit generation. The proposal envisions a process in which the list of inelastic area source types will be made available to the public on the commission's website; any person may submit a written petition to the executive director requesting to add or remove a category from the list; within 60 days of receiving a petition the executive director will prepare a draft revised list or propose denial of the petition by preparing a draft denial statement supporting denial of the petition; the executive director would make the draft revised list, or draft denial statement, available for public comment for 30 days; within 30 days of the public comment period ending, the executive director will issue a proposed final list or a proposed final denial statement for consideration and approval by the commission; the commission will approve, modify, or deny the proposed revisions to the list of inelastic area sources categories made by the executive director; the commission will approve, modify, or remand to the executive director for further consideration a recommendation to deny a petition submitted by the executive director; and an ERC would not be issued or denied for an area source category petitioned to be added or removed from the inelastic list until final determination of the petition is made by the commission. The commission envisions that the initial list of inelastic area source types of gas stations, restaurants, dry cleaners, and concrete batch plants, and source types that are added or deleted based on received comments for this rulemaking, would be published as part of this rulemaking.

In §101.303(b)(2), language changes are proposed to specify that the activity and emission rate used to calculate historical adjusted emissions must be determined from

the same two consecutive calendar years for facilities at both point and area sources. Proposed language is added to require that the "lookback" for area sources be the five years immediately before the emissions reduction is achieved unless detailed operational records are available for more than five years. The lookback period for an area source may be up to ten years immediately before the emissions reduction when detailed operational records are available for those years. If an applicant has ten years of detailed records, the lookback period could be ten years, but if the applicant only has eight years of detailed records, then the lookback period would only be eight years. This distinction between the lookback period for point and area sources is intended to ensure that the air shed realizes actual emissions reductions from the actions used to generate credits by reducing the circumstances in which credits could be issued for inherent emissions reductions and to address the uncertainties associated with emissions estimations for area sources, which are generally not required to have a case-by-case air authorization or perform annual EI reporting.

As §101.303(c) is proposed to be expanded, existing §101.303(c) is relettered as §101.303(c)(1) for clarity. Language is proposed to be added as §101.303(c)(2) to establish a 15% adjustment to the amount of credits generated for area source shutdown actions, with a proposed minimum reduction of 0.1 tpy. Language is proposed to be added as §101.303(c)(3) to establish a 15% adjustment for records to support approved alternative methods to quantify emissions (minimum 0.1 tpy reduction). No adjustment would be required when the area source has the same type of emissions records that are required to be maintained by regulation or authorization

for a facility operating as a point source or as a component of a point source. Language is proposed to be added as §101.303(c)(4) to establish that the total combined adjustment shall be at least 0.1 tpy and no more than 20%, if the facility is subject to an adjustment based on both the reduction strategy being a shutdown and the quality of the data used to quantify the emissions. The total adjustment is limited to 20% to prevent the adjustment from becoming a disincentive to participation in credit generation. As with the exclusion of inelastic (highly interchangeable) area sources whose activity is driven by population needs, the adjustment to the quantity of credits issued for the shutdown of an individual area source is proposed as a means to account for the potential overall increase in nonattainment area emissions from potential shifting of activity. This adjustment is proposed to account for the possibility that some unanticipated or undetected shifting of emissions may occur from the shutdown of sources that are not inelastic. The adjustment to the quantity of credits issued based on the quality of the data used to determine the emissions is proposed as a means to account for the uncertainty associated with emissions estimation techniques for area sources.

In §101.303(d)(1), language reorganization and changes are proposed to specify that applications for ERCs must be signed by an authorized account representative and submitted no more than two years after the reduction in the facility's actual emissions occurs in most cases. The existing provisions of §101.303(d)(1) regarding review to determine creditability and certification of reductions are proposed to be relocated to a proposed §101.303(d)(1)(A).

The revised language at §101.303(d)(1)(B) is proposed to facilitate program implementation by ensuring that credit generation possibilities are assessed based on when the emissions reduction occurs at a particular facility in most cases.

To facilitate program implementation, the facility-specific emissions reduction date would be used to set both that facility's credit application deadline and the credit expiration date in most cases. For example, when an oil and gas production site ceases operation, the emissions from the various facilities (compressors, dehydrators, and sweeteners, tanks, fugitives, etc.) usually end at different times, potentially resulting in multiple credit application deadlines and expiration dates. Specifically, when gas production stops, the compressor, dehydrator, and sweetener would soon stop being used and emitting. The crude oil, condensate, and produced water tanks would stop having flash gas and working loss emissions soon after production stops, but breathing losses would continue until they are cleaned or removed. Breathing losses would decline after the product or waste is removed, corresponding to the final disposition date reported to the Railroad Commission of Texas. After that, the only breathing losses would be from residual material volatilizing. Fugitive emissions would continue until piping is drained. The date each facility's emissions ended would set that facility's credit application deadline and expiration date. The generator could choose to consolidate the credits into one application and/or ERC certificate by using the earliest emission reduction date if all the grouped facilities use the same baseline years. Well plugging may be completed after the application deadline. However, to

ensure compliance with the federal requirements for demonstrating that credited emissions reductions are real and permanent, the closure of individual facilities at an oil and gas production site that is ceasing operations cannot be credited until the well is plugged.

The credit application deadline and expiration date would be set in the same manner as described earlier when emissions are reduced at an individual facility that is part of a site with on-going operations. For example, if a tank at an oil and gas production site that is still producing is taken out of service and the material is piped to another authorized tank, the emission reduction associated with the first tank's removal, less any emissions increase from the second tank, could be credited. In this case, because operations are on-going, well plugging would not be required.

The commission is proposing incentives for emission credit generation from oil and gas production sites that expeditiously plug wells. To encourage expedited oil and gas well plugging, the proposed rule includes a limited exception, at §101.303(d)(1)(C), to the standard requirements for credit application deadlines. Proposed §101.303(d)(1)(C) also provides an exception to the standard credit life when specific criteria are met. Oil and natural gas production is a significant portion of the Texas economy and is highly dependent on the price volatility of oil and natural gas, leading in some cases to operators abandoning wells without plugging them. The problem of abandoned unplugged wells is a state priority primarily addressed by the Railroad Commission of Texas through bonding requirements which provide funding for state directed

plugging for abandoned wells that are causing or may cause pollution. Because abandoned wells have potential environmental consequences to air and groundwater in addition to other nuisance conditions, the commission has determined that it is appropriate to provide additional incentives in the emission banking and trading program to assist in mitigating the number of wells that are abandoned and not plugged.

The proposed provision at §101.303(d)(1)(C) allows credit generation applications for facilities affected by a complete production site shutdown to be submitted two years after the site's production well is plugged (as opposed to two years after the individual facility's emission reduction date) when the well is plugged in accordance with the technical specifications required by the Railroad Commission of Texas and when the plugging is completed within one year of final production being reported to the Railroad Commission of Texas. Emission credits certified under this exception are proposed to be available for use for 72 months from the date well plugging is completed. The "lookback" for establishing historical adjusted emissions would be set based on the same date used to set the credit application deadline and expiration. Use of the well plugging date instead of each facility's individual emission reduction date to set the credit application deadline and expiration date provides significant flexibility and efficiency to the applicant. In addition, the opportunity for an additional year of use may add to the market value of the credit.

The proposed provisions at §101.303(d)(1)(D)(i) and (ii) would establish the following

temporary application deadline provisions for area source facilities: for emissions reductions that occurred after June 1, 2013 and prior to January 1, 2015, the application for ERCs must be submitted by December 31, 2017; and for emissions reductions that occurred between January 1, 2015 and January 1, 2017, the application for ERCs may be submitted up to three years after the reduction in the facility's actual emissions occurs. As proposed in §101.303(d)(1)(D)(iii), these temporary application deadline extensions would no longer apply after December 31, 2019. Proposed §101.303(d)(1)(D)(iv) would allow emission credits certified under these temporary application deadline extensions or certified for area source emission reductions occurring and included on an application submitted, but not acted on, before January 1, 2017 to be available for use for 72 months from the date of the emission reduction in lieu of the 60 months outlined in §101.309(b)(2).

These temporary extensions of the credit application deadline and availability are proposed to support the transition to the proposed requirements, which provide a viable path for processing area and mobile source credit applications. The proposed specific dates are based on the anticipated effective date of this proposed rule revision and the timeframe in which review of area and mobile source credit generation applications has been deferred. In December 2014, the commission proposed to remove the provisions for generating ERCs and DERCs from area and mobile sources and the agency has not processed area and mobile source credit generation applications since that time. Some potential applicants have communicated that they did not invest in developing credit generation application materials because the agency

is not processing area and mobile source applications.

Prior to the December 2014 proposed rule revisions, the deadline for application submission was 180 days from the emission reduction. Thus, emission reductions that occurred prior to June 1, 2013 should have already been included in a submitted application by the point at which the deferral of application processing began, so an extension of the application deadline is not appropriate for these situations. The end date for emissions reductions covered by §101.303(d)(1)(D)(i) (January 1, 2015) and the application deadline for emissions reductions covered by §101.303(d)(1)(D)(i) (January 1, 2018) are based on the intention of providing potential applicants who may have been influenced by the deferral of application review since December 2014 with a reasonable amount of time to prepare a technically complete application following the completion of this rulemaking.

The additional year proposed to be allowed for emissions reductions that occurred between January 1, 2015 and January 1, 2017 in §101.303(d)(1)(D)(ii) is included to facilitate program implementation. While potential applicants with emission reductions in this time period may be able to prepare adequate applications by the two-year application deadline based on the requirements in this proposal, it is anticipated that providing additional application preparation time after rule adoption to those who may have been influenced by the deferral of application review will result in more technically complete application packages, facilitating efficient review. As the market value of a credit can be influenced by the time remaining until the credit

expires, the temporary credit availability extension proposed at §101.303(d)(1)(D)(iv) is included to avoid penalizing applicants influenced by the deferred application processing.

The temporary extensions of the credit application deadlines and availability are intended to improve the viability of credit generation for applicants influenced by the deferred application processing. The commission does not expect that these limited exceptions to the standard application and credit use deadlines would result in adverse air quality impacts because they would result in only a small number of credits being generated (given the requirement for the timing of the emission reduction and the limited timeframe for the exceptions). In addition, the commission expects that any air quality impacts of these limited exceptions would be minimal because all area and mobile source applications that experienced deferred application review will be subject to the requirements adopted as a result of this rulemaking.

In §101.303(d)(2), citations are updated to reflect proposed changes elsewhere in the rule.

Language is proposed in §101.303(d)(3)(E) to clarify that the requirement to include self-reported EI data for the years used to determine the SIP and historical adjusted emissions is only for point sources, as area sources are not required to report to the EI.

In §101.303(d)(4)(C), language changes are proposed to replace agreed orders with a

new EBT certification form to make credited emissions reductions enforceable. The new form would be required whenever a New Source Review permit is not available to document the special conditions associated with the creditable emissions reduction and may be used with a Form APD-CERT when a Form APD-CERT is used to certify an emissions limit. The EBT certification form is being proposed to facilitate more efficient program implementation rather than the use of agreed orders, which require individual commission actions.

Point and area source applicants that are not authorized by a New Source Review permit and use Form APD-CERT to certify an emissions limit for credit generating purposes would now be required to submit that form via the commission's e-permitting system. This new requirement, to submit the Form APD-CERT via the commission's e-permitting system, facilitates credit generation application processing since the e-permitting system automatically assigns a registration number to the applicant. The certification made in a permit modification or on Form APD-CERT and an EBT certification form makes the reductions federally enforceable.

§101.304, Mobile Emission Reduction Credit Generation and Certification

Language is proposed to be revised at §101.304(a)(1) to make MERC requirements be consistent with ERC requirements, which allow the executive director, instead of the commission, to approve an ERC certification.

Language is proposed to be added as §101.304(a)(2)(D) to specify that MERCs cannot

be generated from the shutdown or replacement of a mobile source unless that source is rendered permanently inoperable or permanently removed from North America to ensure that the credited emissions reduction is real and permanent. Allowing the operators of a mobile source to make the source permanently inoperable or permanently removed from North America provides flexibility for resale while minimizing the risk to the requirement that the credit emissions reduction be real and permanent.

Language is proposed to replace existing §101.304(b)(2) with proposed subsection (b)(2), and added as proposed §101.304(b)(3) and (4), to specify the timing and location considerations for setting the SIP and historical adjusted emissions for a mobile source. These restrictions are proposed to ensure that credited emissions reductions meet the requirements to be real in terms of the relevant air shed by limiting baseline emissions to those that occurred within a specific nonattainment area. Existing §101.304(b)(3) is renumbered as subsection (b)(5).

The mobile source historical adjusted emissions must be determined from the activity and emission rates for the same two consecutive calendar years. Language is proposed to require that the lookback be the five years immediately before the emissions reduction is achieved unless detailed operational or emissions records are available for more than five years. The lookback period for a mobile source may be up to ten years immediately before the emissions reduction when detailed operational records are available for those years and do not demonstrate decreasing use due to vehicle age or

inoperability. If an applicant has eight years of detailed operational records, the lookback period would only be eight consecutive years. The proposed lookback period requirement for mobile sources is intended to ensure that the air shed realizes actual emissions reductions from the actions used to generate credits by reducing the circumstances in which credits could be issued for inherent emissions reductions (such as diminished use of an older vehicle) and to address the uncertainties associated with emission estimation for mobile sources, which are not required to have an air authorization or perform annual EI reporting. In addition, it is proposed that a single year of data might be used with executive director approval for vehicles with less than two years use in the nonattainment area. The subsequent paragraph would be renumbered.

Language is proposed to be revised in §101.304(c) to specify that strategic emissions are based on when the source is operating in a specific nonattainment area. The revision also adds adjustments to the MERC calculation related to the reduction strategy being a shutdown or the quality of the data used to quantify the emissions. The revisions to §101.304(c) are proposed as a means to account for the potential overall increase in nonattainment area emissions from shifting activity and to account for the uncertainty associated with emissions estimation methods for mobile sources.

Language is proposed to be added as §101.304(c)(1) to establish a reduction of 15% or 0.1 tpy, whichever is greater, to the amount of credits generated for mobile source shutdown actions. Language is proposed to be added as §101.304(c)(2) to establish a

reduction of 15% or 0.1 tpy, whichever is greater, for records supporting approved alternative methods for quantifying emissions. Language is proposed to be added as §101.304(c)(3) to establish that the total combined reduction would be 20% or 0.1 tpy, whichever is greater, if the mobile source is subject to an adjustment based on both the reduction strategy being a shutdown and the quality of the data used to quantify the emissions. The total adjustment is limited to 20% to prevent the adjustment from becoming a disincentive to participation in credit generation. The adjustment to the quantity of credits issued for the shutdown of a mobile source is proposed as a means to account for the potential overall increase in nonattainment area emissions from shifting of activity. The adjustment to the quantity of credits issued based on the quality of the data used to determine the emissions is proposed as a means to account for the uncertainty associated with emissions estimation techniques for mobile sources.

In §101.304(e)(1), language reorganization and changes are proposed to specify that applications for MERCs must be signed by an authorized account representative and submitted no more than two years after the reduction in the mobile sources actual emissions occurs in most cases. The existing provisions of §101.304(e)(1) regarding review to determine creditability and certification of reductions are proposed to be relocated to §101.304(e)(1)(A).

The proposed provision at §101.304(e)(1)(B) would conform the application deadline requirement to the program's current practice of assessing credit generation

possibilities based on when the emissions reduction occurs for the mobile sources.

The proposed provisions at §101.304(e)(1)(C)(i) and (ii) would establish the following temporary application deadline provisions for mobile sources: for emissions reductions that occurred after June 1, 2013 and prior to January 1, 2015, the application for MERCs must be submitted by December 31, 2017; and for emissions reductions that occurred between January 1, 2015 and January 1, 2017, the application for MERCs may be submitted up to three years after the reduction for the mobile sources actual emissions occurs. As proposed in §101.304(e)(1)(C)(iii), these temporary application deadline extensions would no longer apply after December 31, 2019. Proposed §101.303(e)(1)(C)(iv) would allow emission credits certified under these temporary application deadline extensions or certified for mobile source emission reductions occurring and included on an application submitted, but not acted on, before January 1, 2017 to be available for use for 72 months from the date of the emission reduction in lieu of the 60 months outlined in §101.309(b)(2).

The proposed provisions in §101.304(e)(1)(C)(i) - (iv) for mobile sources are consistent with the proposed changes in §101.303(d)(1) for area sources. As discussed in the Section by Section Discussion portion of this preamble regarding §101.303(d)(1), the proposed limited extensions for credit applications and availability are intended to support the transition to the proposed requirements, which provide a viable path for processing area and mobile source credit applications. As with proposed §101.303(d)(1), the dates in proposed §101.304(e)(1) are based on the anticipated

effective date of this rule revision and the timeframe in which area and mobile source credit application review has been deferred following the December 2014 commission proposal to remove the provisions for area and mobile source ERCs and DERCs.

The temporary extensions of the credit application deadlines and availability are intended to improve the viability of credit generation for applicants influenced by the deferred application processing. The commission does not expect that these limited exceptions to the standard application and credit use deadlines would result in adverse air quality impacts because they would result in only a small number of credits being generated (given the requirement for the timing of the emission reduction and the limited timeframe for the exceptions). In addition, the commission expects that any air quality impacts of these limited exceptions would be minimal because all area and mobile source applications that experienced deferred application review will be subject to the requirements adopted as a result of this rulemaking.

In §101.304(e)(2), language changes are proposed to update references.

Language is proposed to be added as §101.304(e)(3) to specify that the amount of credits issued for an individual mobile source will be adjusted based on its remaining useful life to ensure the credits are surplus to the fleet turnover assumptions used in the applicable SIP revision. The amount of credits certified for the mobile source emissions reduction is proposed to be annualized over 25 years. This requirement is proposed based on program experience that most credits are used to comply with

stationary source offset requirements. The 25 years used to annualize the total emissions reductions is a reasonable amount of time that represents the expected operation of a generic point source. This process simplifies program implementation by ensuring that MERCs are eligible to be used as offsets, the most common use. The expected remaining useful life is determined based on assumptions included in the applicable SIP revision, such as, but not limited to, parameters used in the on-road mobile model and in the Texas non-road model for calculating fleet turnover. While the commission anticipates that nearly all types of mobile sources are reflected in the models, any mobile source not reflected in these models will be handled on a case-by-case basis, as approved by the executive director.

Language is proposed to be added as §101.304(e)(4) to provide an exception to the requirements to consider the expected remaining useful life of the mobile source and to annualize the emissions reduction over 25 years if a capture and control system is used to reduce mobile source emissions. Section 101.304(e)(4)(A) establishes that, for these capture and control system projects, as appropriate, the MERC calculation would consider: the mobile source emissions that are not captured; any emissions not controlled by the system; and any emissions caused by or as a result of operating and/or moving the system. Section 101.304(e)(4)(B) is proposed to require that the initial owner of the MERCs is the owner or operator of the capture and control system. The provisions in §101.304(e)(4) are proposed to facilitate program implementation regarding use of capture and control systems for mobile sources as stakeholders have expressed interest in using these types of controls, which have historically been

primarily applicable to stationary sources. The subsequent subparagraphs would be renumbered.

Language changes are proposed to renumbered §101.304(e)(5) to remove the name of the application form (to avoid future rulemaking if the name changes), clarify that the application is to be signed by an authorized account representative, and require that the supporting documentation include records to characterize the source's historical adjusted and SIP emissions estimates.

In renumbered §101.304(e)(6), language changes are proposed to specify that an EBT certification form will replace agreed orders as the method to document special conditions associated with credited emissions reductions, such as, but not limited to, written certification and photographs when a replaced or shutdown mobile source is made permanently inoperable, for an on-road mobile source, a certified or duplicate Texas Nonrepairable Vehicle Title when a replaced or shutdown mobile source is made permanently inoperable, and a bill of sale and bill of lading when a replaced or shutdown mobile source is permanently removed from North America. The EBT certification form is proposed to be the mechanism to ensure emissions reductions from mobile sources are permanent and federally enforceable as it will ease program implementation relative to the use of agreed orders for this purpose.

§101.306, Emission Credit Use

In existing §101.306(c)(1) and (2), there are different deadlines for submitting an

application to use ERCs and MERCs. The differences arose in the previous rule project because the provisions for MERCs were not changed when the repeal of §101.304 was not adopted. However, there is no reason to have different deadlines for applications for using ERCs and MERCs, so the commission proposes to remove the provisions specific only to MERCs and to make the provisions for ERCs apply to both ERCs and MERCs. Similarly, the provisions added in the prior rulemaking on restrictions of the earliest date that a use application can be submitted are needed for MERCs for the same reasons they are needed for ERCs: the applicant must have the emission credit in the portfolio of the site where the offsets are needed for the use application to be processed; and to avoid circumvention of the provision of emission credits expiring, applicants would not be allowed to submit an application for using emission credits as offsets until an application for the permit or amendment is determined to be administratively complete. Additionally, the requirement to identify the MERCs to be used as offsets before permit issuance would be deleted to allow additional time for obtaining the MERCs and to avoid the need to modify the permit if different MERCs are used as offsets than were originally intended. A deadline for submitting a MERC use application before the start of operation, rather than before construction as in existing §101.306(c)(2)(A), would be consistent with NNSR requirements for the new or modified facility to obtain offsets before beginning operation. It is also consistent to remove the requirement in existing §101.306(c)(2)(A) for users to identify MERCs prior to permit issuance because this is not a requirement in the commission's NNSR permit program in Chapter 116, Subchapter B. However, any facility using MERCs as NNSR offsets could not start operation until the use of the MERCs as an offset is approved,

as is provided for ERCs. The provision in existing §101.306(c)(2)(B) would be removed because the provision that users must keep records is also in §101.302. With these proposed changes, §101.306(c)(1) no longer differentiates between ERC and MERC use applications and existing paragraph (3) would be renumbered as paragraph (2).

In §101.306(d), the commission proposes to expand the inter-pollutant use of ERCs to include MERCs by replacing the acronym "ERCs" with the term "emission credits" throughout the subsection. The restriction on inter-pollutant use of emission credits as offsets for NNSR permits, the requirements for modeling to demonstrate that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution (as required under the FCAA), and the requirement that the user receive approval from the executive director and the EPA before inter-pollutant use occurs are retained for both types of emission credits.

Division 4: Discrete Emission Credit Program

§101.370, Definitions

An amendment to §101.370(4), the definition for "Baseline emissions," is proposed for more consistent use of terminology. The proposed amendment would conform the definition to the program's current practice of assessing credit generation possibilities based on the emissions reduction at a particular facility.

The definition for emission reduction at §101.370(10) is proposed to be modified for clarity.

The definition of "Generation period" at §101.370(13) is proposed to be revised to apply to both DERs and mobile discrete emission reduction credits (MDERs).

The definitions for "Historical adjusted emissions," "Mobile discrete emission reduction credit," "Mobile Source," and "Mobile source baseline emissions" at §101.370(15) - (17) and (19), respectively, are proposed to be amended to facilitate program implementation by increasing consistency in the procedures used for stationary and mobile sources. The revised definitions would make historical adjusted emissions apply to both stationary and mobile sources, MDERs be expressed in tenths of a ton and be generated from groups of mobile sources, a mobile source can be any source included in the agency's EI under the mobile source category, and mobile source baseline emissions the lowest of the source's historical adjusted emissions or SIP emissions.

A definition of "Point source" is proposed to be added as §101.370(22) to specify sources that are not area or mobile.

A definition of "Primarily operated" is proposed to be added as §101.370(23) to specify how to determine when a mobile source is operated often enough in a specific nonattainment area for reductions to be creditable. As discussed elsewhere in the Section by Section Discussion of this preamble related to ERCs, mobile sources are proposed to be considered primarily operated in a specific nonattainment area if at

least 85% of their activity occurs in that area.

A definition for "Projection-base year" is proposed to be added as §101.370(24) to clarify the year in which a point source facility must be in operation in order to potentially qualify to generate an emissions credit. The subsequent definitions would be renumbered.

At renumbered §101.370(27), the definition of "Real reduction" is proposed to be revised to clarify that reductions from the following are not creditable: lowering the permit allowable emission limit without a physical change or change in method of operation; shifting a vent gas stream, or other pollution or waste stream, to another site; a mobile source that is not capable of being operated as intended; or a change in the emissions factor or emissions calculation equation. The purpose for this proposed change is to ensure that emissions from credited reductions are real and do not return to the air shed from the generating source or by redirecting the source of the emissions to another site.

At renumbered §101.370(31), the definition of "State implementation plan (SIP) emissions" is proposed to be revised to clarify that the definition applies to facilities at point or area sources and to mobile sources. The proposed changes to this definition are not intended to alter how SIP emissions are determined for point sources. The proposed changes would establish that, for area and mobile sources, SIP emissions are actual emissions in the year of the latest TCEQ-generated NEI used to develop

modeling included in the applicable SIP revision.

In addition, the definition of SIP emissions is proposed to be revised to specify that, for area and mobile sources, credits will only be generated for actual emissions from each source, as verified by records provided with the application. Emission credits will not be issued beyond the amount of actual emissions from a source during the latest NEI year used to support modeling in the applicable SIP revision, not to exceed any applicable local, state, or federal requirement, as calculated using the best available data. For example, the latest NEI year used to support SIP modeling for both the DFW and HGB nonattainment areas is 2014. Thus, the SIP emissions for an area or mobile source would be the source's actual emissions from Calendar Year 2014. As such, an area or mobile source must have been operational during 2014 to be eligible for credit generation under the current applicable SIP revision.

For the area, on-road mobile, and non-road mobile source categories, the commission proposes to reduce the total amount of SIP emissions eligible for credit generation to mitigate uncertainties associated with the emission estimates, which are generally not based on source-specific data. In practice, the commission would determine the SIP emissions for potential credit generation by reducing the total value in the applicable SIP revision by: 25% for area (excluding residential) and non-road mobile sources (75% of SIP emissions for these categories is available for credit generation); and 15% for the on-road mobile source category (85% of SIP emissions for this category is available for credit generation). After the initial set-aside is accounted for, the commission would

make the pool of remaining emissions available for credit generation.

Finally, the definition is proposed to be revised to establish that the applicable SIP revision for determining the SIP emissions will be set in the order of SIP revisions listed in proposed §101.370(31)(B) and (E) of this definition. This will facilitate program implementation by setting the applicable SIP revision for area and mobile sources in a manner that is consistent with the treatment of point sources.

§101.372, General Provisions

Amended §101.372(a)(1) and (a)(2), and the deletion of existing §101.372(a)(2) are proposed to facilitate program implementation by increasing consistency in the procedures used for stationary and mobile sources as both types of discrete emission credits (DERCs and MDERCs) are proposed to be eligible for inter-pollutant trading as provided by §101.376.

Amended §101.372(b) is proposed to clearly specify that point, area, and mobile sources are eligible to generate discrete emission credits. Language is proposed to be added as §101.372(c) to specify that the following types of sources cannot generate credits: residential sources; sources that do not have records to support approved or approvable methods to quantify emissions; on-road mobile sources that are not part of an industrial, commercial, nonprofit, institutional, or municipal/government fleet; and mobile sources that do not primarily operate within the nonattainment area. These categories are proposed to be restricted from generating credits as the sources cannot

be expected to meet the federal requirements regarding emissions reductions being real, surplus, and quantifiable. An exception is provided to the ineligibility requirement related to primarily operating in a specific nonattainment area to allow flexibility for generating credits from marine and locomotive sources that use capture and control emissions reduction systems. The subsequent subsections would be relettered.

Under proposed §101.372(c)(2), the types of records expected include documentation of the characteristics taken into consideration to estimate emissions, such as activity level, emission flow rate, pollutant concentration, etc. The approved or approvable methods required would include previously EPA-approved protocols or protocols submitted to EPA for approval under relettered §101.372(e).

To ensure creditable emissions reductions are surplus as required, language is proposed to be revised at relettered §101.372(d)(1)(C) and (2)(B) - (D) to specify, respectively, that individual facilities and mobile sources cannot generate credits unless the reduction occurred during or after the SIP emissions year and the sources were operated in an applicable nonattainment area during the SIP emissions year.

To ensure creditable emissions reductions are quantifiable as required, language is proposed to be added as §101.372(e)(1)(C) to specify that, except as specified in §101.372(e)(1)(A) and (B), the owner or operator of a source subject to 30 TAC Chapter 106 or a permit issued under 30 TAC Chapter 116 must use the required testing and

monitoring methodologies that apply to its facilities to show compliance with the applicable requirements. The subsequent subparagraphs would be relettered.

To assist in facilitating efficient submittal and processing of credit applications, language is proposed to be added at §101.372(f) to specify that beginning January 1, 2018 all credit applications must be electronically submitted through STEERS unless an applicant receives prior approval for an alternative form of application submission.

To facilitate efficient program implementation, language is proposed to be added at relettered §101.372(g)(1) to specify that an individual area source facility, aggregated fugitive emissions, and aggregated mobile sources (for the pollutant and reduction date) incapable of generating at least 0.1 ton of credit after all adjustments are applied cannot generate discrete emission credits. It is also proposed that fugitive emissions or mobile source emissions aggregated to meet the requirement that emission reductions be certified for at least 0.1 ton must be represented on the same application and will have an application deadline date determined by the earliest emission reduction date among the aggregated sources.

§101.373, Discrete Emission Reduction Credit Generation and Certification

In §101.373(b)(2), language changes are proposed to specify that the emission and activity rates used to calculate historical adjusted emissions must be determined from the same two consecutive calendar years for facilities at both point and area sources. Language is proposed to require that the "lookback" for area sources be the five years

immediately before the emissions reduction is achieved unless detailed operational records are available for more than five years. The lookback period for an area source may be up to ten years immediately before the emissions reduction when detailed operational records are available for those years. If an applicant has ten years of detailed records, then the lookback period could be ten years, but if the applicant only has eight years of detailed records, then the lookback period could only be eight years. This distinction between the lookback for point and area sources is intended to ensure that the air shed realizes actual emissions reductions from the actions used to generate credits by reducing the circumstances in which credits could be issued for inherent emissions reductions and to address the uncertainties associated with emission estimation for area sources, which are generally not required to have a case-by-case air authorization or perform annual EI reporting.

Language is proposed to be added as §101.373(c)(2) to establish a credit reduction of 15% or 0.1 ton, whichever is greater, for records to support approved alternative methods for quantifying emissions. No reduction would be required when records for quantifying emissions are the same type of records that are required to be maintained by regulation or authorization for a facility operating as a point source or as a component of a point source. The adjustment to the quantity of credits issued based on the quality of the data used to determine the emissions is proposed as a means to account for the uncertainty associated with emissions estimation techniques for area sources. These proposed changes would result in the subsequent paragraphs being renumbered.

In §101.373(d)(1), language changes are proposed to specify that the application must be signed by an authorized account representative. References are updated in §101.373(d)(2). In addition, language is proposed in §101.373(d)(3)(F) to clarify that the requirement to include self-reported EI data for the years used to determine the SIP revision and historical adjusted emissions is only for point sources as area sources are not required to report to the EI.

§101.374, Mobile Discrete Emission Reduction Credit Generation and Certification

Language is proposed to be added to §101.374(a)(1) to clarify that the number of years that an emissions reduction can be used for generating MDERCs is limited by the expected remaining useful life of the mobile source. As described previously in the preamble for MERCs, the expected remaining useful life is generally determined based on assumptions included in the applicable SIP revision, such as, but not limited to, parameters used in the on-road mobile model and in the Texas non-road model to calculate fleet turnover. An exception to the requirement to consider the expected remaining useful life of the mobile source is included if a capture and control system is used to reduce mobile source emissions.

Language is proposed to be replaced at §101.374(b)(2) and added as §101.374(b)(3) and (4) to specify the timing and location considerations for setting the SIP and historical adjusted emissions for a mobile source. These restrictions are proposed to ensure that emission reductions meet the requirements to be real in terms of the

relevant air shed.

The mobile source historical adjusted emissions must be determined from the emission and activity rates during the same two consecutive calendar years. Language is proposed to require that the lookback be the five years immediately before the emissions reduction is achieved unless detailed operational records are available for more than five years. The lookback period for a mobile source may be up to ten years immediately before the emissions reduction when detailed operational records are available for those years and do not demonstrate decreasing use due to vehicle age or inoperability. If an applicant has eight years of detailed records, then the lookback period would be eight consecutive years. The proposed lookback period requirement for mobile sources is intended to ensure that the air shed realizes actual emissions reductions from the actions used to generate credits by reducing the circumstances in which credits could be issued for inherent emissions reductions (such as diminished use of an older vehicle) and to address the uncertainties associated with emissions estimation for mobile sources, which are not required to have an air authorization or perform annual EI reporting. In addition, it is proposed that a single year of data might be used with executive director approval for vehicles with less than two years use in a nonattainment area. The subsequent paragraph would be renumbered.

Language is proposed to be added in §101.374(c)(1) to establish a reduction of 15% or 0.1 tons, whichever is greater, to the amount of credits generated for mobile source shutdown actions. Language is proposed to be added in §101.374(c)(2) to establish a

reduction of 15% or 0.1 tons, whichever is greater, for records supporting approved alternative methods for quantifying emissions. Language is proposed to be added in §101.374(c)(3) to establish that the total combined adjustment shall be at least 0.1 tons and no more than 20% if the mobile source is subject to an adjustment based on both the reduction being a shutdown and the quality of the data used to quantify the emissions. The total adjustment is limited to 20% to prevent the adjustment from becoming a disincentive to participation in credit generation. The adjustment to the quantity of credits issued for the shutdown of a mobile source is proposed as a means to account for the potential overall increase in nonattainment area emissions from the shifting of emissions location. The adjustment to the quantity of credits issued based on the quality of the data used to determine the emissions is proposed as a means to account for the uncertainty associated with emissions estimation techniques for mobile sources.

Language is proposed to be added as §101.374(c)(4) to establish that for capture and control system projects, as appropriate, MDERCs calculation would consider: the mobile source emissions that are not captured; any emissions not controlled by the system; and any emissions caused by or as a result of operating and/or moving the system. In addition, §101.374(c)(4) proposes to require that the initial owner of the MDERCs is the owner or operator of the capture and control system. The provisions in §101.374(c)(4) are proposed to facilitate program implementation regarding use of capture and control systems for mobile sources as stakeholders have expressed interest in using these types of controls, which have historically been primarily

applicable to stationary sources.

In §101.374(e)(1), the proposed changes include substituting the generic wording "application form designated by the executive director" in place of the specific form name and designation (to avoid future rulemaking if the name changes), as well as requiring the application to be signed by an authorized account representative. Proposed language also includes replacing "discrete emission reduction strategy activity has been completed, or" with "end of the generation period," replacing "the first" with "each," and removing the last sentence to simplify the requirement to submit an application to generate MDERCs within 90 days after each 12-month generation period and 90 days after the generation period ends, regardless of length. This submission schedule is consistent with the definition of "generation period" in the current and revised rules because each generation period cannot exceed 12 months. A separate application is needed to generate MDERCs from each generation period.

In §101.374(e)(2), the reference would be changed due to the referenced subsection being relettered. Language changes are proposed to §101.374(e)(3) to remove the name of the application form (to avoid future rulemaking if the name changes), clarify that the application must be signed by an authorized account representative, and to require that supporting documentation be provided with the credit generation application form.

§101.376, Discrete Emission Credit Use

In existing §101.376(a)(6), the acronym "DERC" would be replaced with the term "discrete emission credit" to clarify that neither DERCs or MDERCs can be used before the credits are available in the compliance account of the use site.

The commission proposes to remove existing §101.376(b)(2)(C) for the same reasons as discussed previously in the Section by Section Discussion portion of this preamble regarding the changes to §101.306(c)(1) and (2). This change would have the provisions for DERCs in existing §101.376(b)(2)(D), which would be relettered as §101.376(b)(2)(C), apply to both DERCs and MDERCs by removing the phrase "for the use of DERCs" in existing §101.376(b)(2)(D); these provisions would require the user of MDERCs used as offsets to submit an application form specified by the executive director at least 90 days before the start of operation and before continuing operation for any subsequent period for which the offset requirement was not covered under the initial application. The proposed changes align the MDERC and DERC submission requirements; these proposed submission requirements would also be consistent with corresponding provisions in the ERC Program.

In §101.376(c)(4), the phrase "DERC or mobile DERC" would be changed to "discrete emission credits" for consistency with the phrasing in the rest of the section. In §101.376(d)(1)(B)(ii) and (iii), the commission proposes to remove the acronym "DERC" because both DERCs and MDERCs can be used for compliance with the Mass Emissions Cap and Trade Program and as offsets for new source review permits. For consistency with subparagraph (B), the term "discrete emission credit" would be removed from

§101.376(d)(1)(B)(iv). In §101.376(d)(1)(B)(viii) - (x), the phrasing relating to credits that will be acquired is proposed to be removed because it conflicts with the provision in §101.376(a)(6) that credits must be in the compliance account of the site before use occurs.

In the existing equations in §101.376(d)(2)(A)(i) and (ii) and (d)(2)(C), the commission proposes to change the designation of the variable "DERCs" to "DECs" for clarity. The calculations can be used for either DERCs or MDERCs, so the general term for the credits is more appropriate, and this change will have no effect on the use of the equations.

The reference to "commission" at §101.376(e)(3), is proposed to be changed to "executive director" to conform with current rule drafting policy.

In §101.376(g), the commission proposes to expand the inter-pollutant use of DERCs (i.e., the substitution of a credit certified for one ozone precursor for the other precursor) to include MDERCs by replacing the acronym "DERCs" with the term "discrete emission credits" throughout the subsection. The restriction on inter-pollutant use of discrete emission credits to offsetting for NNSR permits, the requirements for modeling to demonstrate that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution (as required under the FCAA), and the requirement that the user receive approval from the executive director and the EPA before inter-pollutant use

occurs are retained for both types of discrete emission credits.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rules are in effect, fiscal implications, which may be significant, are anticipated for the agency. No fiscal implications are expected for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would revise the EBT rules to ensure credit generation from area or mobile sources meet the requirements of the FCAA. If adopted, the revisions will be submitted to the EPA as a revision to the SIP. Participation in the EBT program is voluntary and transactions related to emission credits would only take place if there was economic benefit for affected emissions sources.

The current EBT rules define several market-based programs that provide sites additional flexibility to comply with air regulations. The EBT rules allow an area or mobile source to generate ERCs and DERCs from emission reductions that are demonstrated to be real, quantifiable, permanent, enforceable, and surplus to the SIP and all applicable rules.

Emission credits (ERCs, MERCs, DERCs and MDERCs) can be traded freely and have values that vary greatly over time, among areas, and by pollutant. ERCs and MERCs are

certified and traded in units of tpy while DERCs and MDERCs are certified and traded simply as tons.

Generally, the proposed rules are anticipated to make it easier for owners of area and mobile sources to generate emission credits. While this opportunity theoretically exists under current rule language, it has rarely been feasible due to implementation issues.

Some provisions in the proposed rulemaking may have potential fiscal impacts relative to current requirements for those few entities with area and mobile sources that are now able to participate. However, because this is a free-market program, estimating costs or cost savings is challenging to predict and would be different for various entities. The proposed rulemaking would affect emissions sources only if they choose to participate in the EBT program.

The following proposed provisions may have fiscal impacts for entities that choose to participate.

The definition of "Real reduction" is proposed to be revised to clarify that crediting reductions that result from: lowering the permit allowable emission limit without a physical change or change in method of operation; shifting a vent gas stream, or other pollution or waste stream, to another site; a mobile source that is not capable of being operated as intended; or a change in the emissions factor or emissions calculation equation.

Area and mobile sources are prohibited from generating emission credits if: the reduction occurred before the SIP emissions year and the facility or mobile source did not operate in the applicable nonattainment area during the SIP emissions year; the individual facility or aggregated mobile sources cannot generate at least 0.1 tpy for ERCs/MERCs and 0.1 tons for DERCs/MDERCs of credit after all adjustments required in the rule are applied; the source is residential in nature; there are not verifiable records with approved or approvable methods to quantify emissions for the source; the emissions reduction is created with an on-road mobile source that is not part of an industrial, commercial, nonprofit, institutional, or municipal/government fleet; the emissions reduction is created with a mobile source that does not operate primarily within the relevant nonattainment area; the emissions reduction is in place beyond the expected remaining useful life of a mobile source; the emissions reduction occurs due to the shutdown of an inelastic source that is related to population needs including, but not limited to, gas stations, restaurants, dry cleaners, and concrete batch plants; or, the emissions reduction occurs from the shutdown or replacement of a mobile source unless that source is rendered permanently inoperable or permanently removed from North America.

For area sources, the historical adjusted emissions must be based on the average annual actual emissions from any consecutive two years within the five years immediately preceding the emissions reduction unless detailed operational records are available to demonstrate the facility's level of activity and emission rate for up to the

preceding ten years. If detailed operational records are available then the lookback period for the historical adjusted emissions could be up to ten years.

For mobile sources, baseline emissions must be determined from two consecutive calendar years selected from the five consecutive years immediately before the emissions reduction is achieved unless detailed operational records are available for up to the preceding ten years. If detailed operational records are available and do not demonstrate decreasing use due to vehicle age or inoperability, then the lookback could be up to ten years before the emissions reductions.

The amount of credits associated with a given mobile source emissions reduction will be based on the remaining useful life of the generating source, annualized over 25 years (i.e., a fixed amount of time that represents the expected operation of a generic point source) to make the credit effective for the life of the applicable user facility. The expected remaining useful life will be determined based on assumptions included in the applicable SIP revision; otherwise, it will be determined on a case-by-case basis if approved by the executive director.

For sources generating credits from a shutdown, the amount of credits generated will be adjusted to account for the potential overall increase in nonattainment area emissions from shifting emissions to another location by a reduction of 15%. The amount of credits generated will be adjusted to account for the quality of the data used to quantify the emissions. The adjustment will be: no adjustment for the same

type of records that are required to be maintained by regulation or authorization for a facility operating as a point source or as a component of a point source; or 15% reduction for verifiable records with approved alternative methods. If the facility or mobile source is subject to an adjustment based on both the reduction strategy being a shutdown and the quality of the data used to quantify the emissions, the total combined adjustment will be a reduction of no more than 20%.

For area sources, the owner or operator of a facility would be required to use the relevant testing and monitoring methodologies required under Chapter 106 or Chapter 116 to show compliance. Because these sources are already required to comply with these requirements, the proposed rulemaking would have no fiscal impact.

Beginning January 1, 2018, a credit application must be submitted through STEERS unless the applicant receives prior approval from the executive director for an alternative form of application submission. Submitting an application electronically may result in minor savings for potential applicants both in time and cost (postage and other minor costs associated with submitting hard copy applications).

Credit generators may be required to meet monitoring, testing, or other special conditions included on the newly required Form EBT-CERT, submitted as part of the credit application. For mobile source credits, the Form EBT-CERT may contain special conditions including, but not limited to, written certification and photographs when a replaced or shutdown mobile source is made permanently inoperable, for an on-road

mobile source, a certified or duplicate Texas Nonrepairable Vehicle Title when a replaced or shutdown mobile source is made permanently inoperable, and a bill of sale and bill of lading when a replaced or shutdown mobile source is permanently removed from North America. There are no fiscal impacts associated with this proposed change. Additional monitoring, testing, recordkeeping, and other requirements may be a condition of a participant receiving a credit under the current rule. The proposed rulemaking only provides an additional mechanism for that process and provides additional specificity for mobile sources as to what some of those conditions may be.

In addition to expanding the opportunity for area and mobile sources to generate credits, the proposed rulemaking also includes changes that provide greater flexibility for the use of emission credits, such as expanding the ability to use credits for one type of pollutant for emission increases of another pollutant. The proposed rules also provide potential applicants more flexibility regarding the timeline for submitting credit generation applications in certain circumstances.

Under the proposed rulemaking, an increase in workload is anticipated for the agency from reviewing area and mobile source credit generation and use applications. In addition, there would be an increase in the number of air authorizations to be amended or reviewed from permitted or registered facilities. The workload increase estimate is based on the assumption that additional EBT applications will be received (estimated to be approximately 100) per year. The EBT Program has historically processed primarily point source applications, and additional ERC and DERC

applications from area and mobile sources is expected to increase the workload by one third to one half. However, it is difficult to anticipate the number or complexity of applications that will be voluntarily submitted.

It is expected that five additional full-time equivalents (FTEs) would be needed for the additional workload. Costs for the FTEs and necessary capital equipment are estimated to be approximately \$272,080 in the first year the rules would be in effect and \$245,680 each year thereafter. The agency has requested the legislature provide additional funding in its Legislative Appropriations Request for the coming biennium.

No fiscal implications are expected for units of state or local government although governmental entities could be affected if these entities have creditable emissions and find economic benefit from participating in this voluntary program. This includes government-owned fleets, airports, waste management facilities, waste water treatment facilities, and others.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the potential for more participation in the EBT programs as a result of the increased flexibility from the proposed rule revisions. If this is indeed the case, the increase in the generation and use of credits could reduce emissions and

improve air quality.

In general, the proposed rules are not anticipated to result in fiscal implications for businesses or individuals. The proposed rules apply only to voluntary programs. The proposed rulemaking may increase the number of eligible sources that can generate, buy, trade, or sell emission credits. Any fiscal implications associated with the increase in the number of eligible sources are very complex and difficult to determine as emission credits have values that vary greatly over time, among areas, and by pollutant. The agency is also not able to predict the number of applications, the specific types of sources, the types of credits, the current and/or future value of credits, as well as a number of other factors.

Participants in the program may have compliance requirements to ensure that emissions reductions associated with credits are real, enforceable, and meet all other requirements of the programs. Such compliance requirements could include monitoring, testing, and recordkeeping and would have costs associated with them. However, these requirements are part of the existing EBT rules for emission credits. The proposed rulemaking would only provide an additional mechanism, a certification form (Form EBT-CERT) by which these requirements would be made enforceable. With regard to mobile sources, the proposed rulemaking would provide more specificity regarding what some of these requirements may be. As such, there is no fiscal impact associated with the proposed changes.

Submitting an application electronically (via STEERS) may result in minor savings for potential applicants both in time and cost (postage and other minor costs associated with submitting hard copy applications). Some of the proposed revisions to the ERC and DERC rules could make it easier to generate credits, which could be used for NNSR offset requirements or sold on the open market.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rules for the first five-year period the proposed rulemaking is in effect for small or micro-businesses. The proposed rulemaking is intended to make it easier for owners of area and mobile sources, including those who are small businesses, to participate in the EBT voluntary programs and obtain an economic benefit from creditable emissions. It is not known how many small or micro-businesses may choose to participate, but for those that do, any new regulatory requirements would be the result of their choice to participate in the EBT programs based upon their determination that such participation would be in their best economic interest.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years

the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rules amend a voluntary program to generate emission reduction credits to improve the flexibility and functionality of these rules, and do not impose requirements that regulated entities must participate in the program. Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major

environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The EBT rules in Chapter 101, Subchapter H define several market-based programs that provide sites with additional flexibility for complying with air regulations, such as the offset requirements in NNSR permits or the unit-specific emission limits in various state rules. These programs include the ERC Program rules in Division 1 that allow sources in nonattainment areas to generate, bank, trade, and use credits from permanent reductions in emissions and the DERC Program rules in Division 4 to allow sources statewide to generate, bank, trade, and use credits from reductions in emissions below regulatory requirements. Because these programs are market-based, the costs associated with trades of credits and allowances are not controlled. In recent years, the cost of credits has risen substantially. In response, there has been significant interest in the regulated community for alternatives that facilitate generation and for flexibility in use. This increased interest has uncovered several implementation issues in the existing EBT rules. This rulemaking proposes to revise the EBT rules in Chapter 101 to respond to these issues and improve the workability and functionality of the

rules.

The proposed rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the National Ambient Air Quality Standard (NAAQS) in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. The proposed rulemaking will revise the EBT rules in Chapter 101 to respond to issues with flexibility and use of the rules, and to improve the workability and functionality of the rules.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand

this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414

S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to revise the EBT rules in Chapter 101 to respond to issues with flexibility and use of the rules and to improve the workability and functionality of the rules. The proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet the definition of a "major environmental rule," and also does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of the rulemaking is to revise the EBT rules in Chapter 101 to respond to issues with flexibility and use of the rules, and to improve the workability and functionality of the rules. Promulgation and enforcement of the amendments will not burden private real property. The rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the ERCs and DERCs that would be affected by these rules are not property rights (see §101.302(k) and §101.372(l)). Because these credits are not property, rules that revise how these credits are generated and used does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC

§505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the proposed amendments are consistent with CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The requirements of 42 USC, §7410 are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permits Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order to include the proposed rules.

Announcement of Hearings

The commission will hold public hearings on this proposal in Houston on April 18, 2017 at 2:00 p.m. in the Auditorium of the Texas Department of Transportation located at 7600 Washington Avenue; in Arlington on April 19, 2017 at 10:00 a.m. in the Transportation Council Room at North Central Texas Council of Governments located at 616 Six Flags Drive; and in Austin on April 20, 2017 at 2:00 p.m. in Building E, room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearings are structured for the receipt of oral or written comments by interested persons.

Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-041-101-AI. The comment period closes on April 24, 2017.

Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Guy Hoffman, Air Quality Planning, 512-239-1981 or guy.hoffman@tceq.texas.gov.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT PROGRAM

§§101.300, 101.302 - 101.304, 101.306

Statutory Authority

The amended sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The rulemaking is proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions

measurements; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended sections are also proposed under THSC, §382.023, concerning Orders, and THSC, §382.036, concerning Cooperation and Assistance. The rulemaking is also proposed under Federal Clean Air Act (FCAA), 42 United States Code, §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.017, 382.021, 382.023, and 382.036.

§101.300. Definitions.

Unless specifically defined in the Texas Clean Air Act or in §3.2 or §101.1 of this title (relating to Definitions), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition, the following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise.

(1) Activity--The amount of activity at a facility or mobile source measured in terms of production, use, raw materials input, vehicle miles traveled, or

other similar units that have a direct correlation with the economic output and emission rate of the facility or mobile source.

(2) Actual emissions--The total emissions during a selected time period, using the facility's or mobile source's actual daily operating hours, production rates, or types of materials processed, stored, or combusted during that selected time period.

(3) Area source--Any facility included in the agency emissions inventory under the area source category.

(4) Baseline emissions--The facility's emissions, in tons per year, [occurring] before implementation of an emission reduction [strategy] calculated as the lowest of the facility's historical adjusted emissions or state implementation plan emissions.

(5) Certified--Any emission reduction that is determined to be creditable upon review and approval by the executive director.

(6) Curtailment--A reduction in activity level at any facility or mobile source.

(7) Emission credit--An emission reduction credit or mobile emission reduction credit.

(8) Emission rate--The facility's rate of emissions per unit of activity.

(9) Emission reduction--A [An actual] reduction in actual emissions from a facility or mobile source.

(10) Emission reduction credit--A certified emission reduction, expressed in tenths of a ton per year, that is created by eliminating future emissions and quantified during or before the period in which emission reductions are made from a facility.

(11) Emission reduction strategy--The method implemented to reduce the facility's or mobile source's emissions beyond that required by state or federal law, regulation, or agreed order.

(12) Facility--As defined in §116.10 of this title (relating to General Definitions).

(13) Generator--The owner or operator of a facility or mobile source that creates an emission reduction.

(14) Historical adjusted emissions--The [facility's] emissions occurring before implementation of an emission reduction strategy and adjusted for any local, state, or federal requirement, calculated using the following equation.

Figure: 30 TAC §101.300(14)

[Figure: 30 TAC §101.300(14)]

$$\frac{(A_1 \times ER_1) + (A_2 \times ER_2)}{2}$$

Where:

EH = The historical adjusted emissions [for a facility].

A_1 = The [facility's] activity during the first of any two consecutive calendar years selected in accordance with §101.303(b)(2) or §101.304(b)(3) of this title (relating to Emission Reduction Credit Generation and Certification or Mobile Emission Reduction Credit Generation and Certification), not to exceed any applicable local, state, or federal requirement.

ER_1 = The [facility's] emission rate during the first of any two consecutive calendar years selected in accordance with §101.303(b)(2) or §101.304(b)(3) of this title, not to exceed any applicable local, state, or federal requirement.

A_2 = The [facility's] activity during the second of any two consecutive calendar years selected in accordance with §101.303(b)(2) or §101.304(b)(3) of this title, not to exceed any applicable local, state, or federal requirement.

ER_2 = The [facility's] emission rate during the second of any two consecutive calendar years selected in accordance with §101.303(b)(2) or §101.304(b)(3) of this title, not to exceed any local, state, or federal requirement.

(15) Mobile emission reduction credit--A certified emission reduction from a mobile source or group of mobile sources, expressed in tenths of a ton [tons] per year, that is created by eliminating future emissions and quantified during or [and]

before the period in which reductions are made from that mobile source or group of mobile sources.

(16) Mobile source--A source included in the agency's emissions inventory under the mobile source category [On-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels)].

(17) Mobile source baseline activity--The level of activity of a mobile source based on an estimate for each year for which the credits are to be generated. After the initial year, the annual estimates should reflect:

(A) the change in the mobile source emissions to reflect any deterioration in the emission control performance of the participating source;

(B) the change in the number of mobile sources resulting from normal retirement or attrition, and the replacement of retired mobile sources with newer and/or cleaner mobile sources;

(C) the change in usage levels, hours of operation, or vehicle miles traveled in the participating population; and

(D) the change in the expected useful life of the participating population.

(18) Mobile source baseline emissions--The mobile source's actual emissions, in tons per year, occurring prior to a mobile emission reduction strategy calculated as the lowest of the historical adjusted emissions or state implementation plan emissions [product of mobile source activity and the mobile source emissions rate not to exceed all limitations required by applicable local, state, and federal rules and regulations].

(19) Mobile source baseline emission rate--The mobile source's rate of emissions per unit of mobile source baseline activity during the mobile source baseline emissions period.

(20) Permanent--An emission reduction that is long-lasting and unchanging for the remaining life of the facility or mobile source. Such a time period must be enforceable.

(21) Point source--A facility included in the agency's emissions inventory under the point source category.

(22) Primarily operated--When the activity is at least 85% within a specific nonattainment area.

(23) Projection-base year--The year of the emissions inventory used to project or forecast future-year emissions for modeling point sources in a state implementation plan revision.

(24) [(21)] Protocol--A replicable and workable method of estimating emission rate or activity level used to calculate the amount of emission reduction generated or credits required for facilities or mobile sources.

(25) [(22)] Quantifiable--An emission reduction that can be measured or estimated with confidence using replicable methodology.

(26) [(23)] Real reduction--A reduction in which actual emissions are reduced. Emissions reductions that result from any of the following are not considered a real reduction:

(A) lowering the allowable emission limit in a permit without a physical change or change in method of operation;

(B) shifting a vent gas stream or other pollution or waste stream to another site;

(C) a mobile source that is not capable of being operated as intended; or

(D) a change in an emissions factor or emissions calculation equation.

(27) [(24)] Shutdown--The permanent cessation of an activity producing emissions at a facility or mobile source.

(28) [(25)] Site--As defined in §122.10 of this title (relating to General Definitions).

(29) [(26)] State implementation plan--A plan that provides for attainment and maintenance of a primary or secondary national ambient air quality standard as adopted in 40 Code of Federal Regulations Part 52, Subpart SS.

(30) State implementation plan (SIP) emissions--SIP emissions are determined as follows.

(A) For point sources, SIP emissions are facility-specific values based on the emissions data in the state's annual emissions inventory (EI) for the year used to develop the projection-base year inventory for the modeling included in an attainment demonstration (AD) SIP revision, used for the attainment inventory for a

maintenance plan SIP revision, or used in an EI SIP revision, as applicable under subparagraph (B)(i) - (iii) of this paragraph. For area and mobile sources, SIP emissions are calculated values based on actual operations during the latest triennial National Emissions Inventory (NEI) year used to support an AD SIP revision, used for the attainment inventory for a maintenance plan SIP revision, or used in an EI SIP revision, as applicable under subparagraph (B)(i) - (iii) of this paragraph. For point, area, and mobile sources located in a nonattainment area without an applicable SIP as determined under subparagraph (B)(i) - (iii) of this definition, SIP emissions are based on the year of the most recent NEI submitted to the United States Environmental Protection Agency (EPA) preceding that area's nonattainment designation for the current National Ambient Air Quality Standard (NAAQS).

(B) The applicable SIP revision must be for the nonattainment area where the facility is located, or for mobile sources where the mobile source is primarily operated, and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. The applicable SIP revision is:

(i) an AD SIP revision or a maintenance plan SIP revision, whichever was most recently submitted to the EPA for the current NAAQS;

(ii) if the SIP revisions identified in clause (i) of this subparagraph have not been submitted to the EPA, an AD SIP revision or a maintenance plan SIP revision, whichever was most recently submitted to the EPA for

an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS; or

(iii) if the SIP revisions identified in clauses (i) and (ii) of this subparagraph have not been submitted to the EPA, the most recent EI SIP revision submitted to the EPA.

(C) The total amount of SIP emissions available for credit generation will be set for area, non-road mobile, and on-road mobile source categories.

(i) Total creditable area source emissions are 75% of the total area source emissions excluding residential area sources in the applicable SIP revision.

(ii) Total creditable non-road mobile source emissions are 75% of the total non-road mobile source emissions in the applicable SIP revision.

(iii) Total creditable on-road mobile source emissions are 85% of the total on-road mobile source emissions in the applicable SIP revision.

(D) The SIP emissions for a facility or mobile source may not exceed any applicable local, state, or federal requirement.

(E) The year used to determine SIP emissions is as specified in subparagraph (A) of this paragraph, unless a different year is specifically identified otherwise by the commission in the most recent SIP revision adopted after December 31, 2017.

[(27) State implementation plan (SIP) emissions--The emissions data in the state's emissions inventory (EI) required under 40 Code of Federal Regulations Part 51, Subpart A for the year used to represent the facility's emissions in a SIP revision. The applicable SIP revision must be for the nonattainment area where the facility is located and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. The SIP emissions may not exceed any applicable local, state, or federal requirement. A facility's SIP emissions are determined from the EI year that:]

[(A) was used to develop the projection-base year inventory for the modeling included in an attainment demonstration (AD) SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the United States Environmental Protection Agency (EPA) for the current National Ambient Air Quality Standard (NAAQS);]

[(B) if the SIP revisions identified in subparagraph (A) of this paragraph have not been submitted to the EPA, was used to develop the projection-

base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the EPA for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS;]

[(C) if the SIP revisions identified in subparagraphs (A) and (B) of this paragraph have not been submitted to the EPA, corresponds to the EI for the most recent EI SIP revision submitted to the EPA; or]

[(D) if the SIP revisions identified in subparagraphs (A) - (C) of this paragraph have not been submitted to the EPA, corresponds to the EI that will be used for the EI SIP revision that will be submitted to the EPA.]

(31) [(28)] Strategic emissions--A facility's or mobile source's new allowable emission limit, in tons per year, following implementation of an emission reduction strategy.

(32) [(29)] Surplus--An emission reduction that is not otherwise required of a facility or mobile source by any applicable local, state, or federal requirement and has not been otherwise relied upon in the state implementation plan.

(33) [(30)] User--The owner or operator of a facility or mobile source that acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

§101.302. General Provisions.

(a) Applicable pollutants.

(1) An emission [reduction] credit [(ERC)] may be generated from a reduction of a criteria pollutant, excluding lead, or a precursor of a criteria pollutant for which an area is designated nonattainment.

(2) An emission credit [ERC] generated from the reduction of one pollutant or precursor may not be used to meet the requirements for another pollutant or precursor, except as provided by §101.306(d) of this title (relating to Emission Credit Use).

[(2) Reductions of criteria pollutants, excluding lead, or precursors of criteria pollutants for which an area is designated nonattainment, may qualify as mobile emission reduction credits (MERCs). MERCs generated from reductions of one pollutant may not be used to meet the requirements for another pollutant, unless urban airshed modeling demonstrates that one ozone precursor may be substituted

for another, subject to executive director and United States Environmental Protection Agency (EPA) approval.]

(b) Eligible generator categories. The following categories are eligible to generate emission credits:

(1) facilities, including both point and area sources;

(2) mobile sources; and

(3) any facility, including both point and area sources, or mobile source associated with actions by federal agencies under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans.

(c) Ineligible generator categories. The following categories are not eligible to generate emission credits:

(1) residential area sources;

(2) facilities or mobile sources that do not have records for approved or approvable methods to quantify emissions;

(3) on-road mobile sources that are not part of an industrial, commercial, nonprofit, institutional, or municipal/government fleet; and

(4) mobile sources that are not primarily operated within a specific nonattainment area with the exception of marine and locomotive sources that use capture and control emissions reduction systems.

(d) [(c)] Emission credit requirements.

(1) An emission reduction credit (ERC) [ERC] is a certified emission reduction that:

(A) must be enforceable, permanent, quantifiable, real, and surplus;

(B) must be surplus at the time it is created, as well as when it is used; and

(C) must occur after the [year used to determine the] state implementation plan (SIP) emissions year for the facility. Individual facilities that were not operated during the SIP emissions year may not be used to generate ERCs.

(2) Mobile emission reduction credits (MERCs) are certified reductions that meet the following requirements:

(A) reductions must be enforceable, permanent, quantifiable, real, and surplus;

(B) the certified reduction must be surplus at the time it is created, as well as when it is used;

(C) in order to become certified, the reduction must have occurred after the [most recent year of] SIP emissions year [inventory used in the SIP];

(D) the reduction must be from a mobile source that operated during [source's annual emissions prior to the emission credit application must have been represented in the emissions inventory used in] the SIP emissions year. [; and]

[(E) the mobile sources must been included in the attainment demonstration baseline emissions inventory.]

(3) Emission reductions from a facility or mobile source that are certified as emission credits under this division cannot be recertified in whole or in part as credits under another division within this subchapter.

(e) [(d)] Protocol.

(1) All generators or users of emission credits shall use a protocol that has been submitted by the executive director to the United States Environmental Agency (EPA) [EPA] for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols must be used as follows.

(A) The owner or operator of a facility subject to the emission specifications under §§117.110, 117.310, 117.410, 117.1010, 117.1210, 117.1310, 117.2010, or 117.2110 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Eight-Hour Attainment Demonstration; and Emission Specifications) shall use the testing and monitoring methodologies required under Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) to show compliance with the emission specification for that pollutant.

(B) The owner or operator of a facility subject to the requirements under Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) shall use the testing and monitoring methodologies required under Chapter 115 of this title to show compliance with the applicable requirements.

(C) Except as specified in subparagraphs (A) and (B) of this paragraph, the owner or operator of a facility subject to the requirements under Chapter 106 of this title (relating to Permits by Rule) or a permit issued under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) shall use the testing and monitoring methodologies required under Chapter 106 of this title or a permit issued under Chapter 116 of this title to demonstrate compliance with the applicable requirements.

(D) [(C)] The executive director may approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility or mobile source.

(E) [(D)] Except as specified in subparagraph (D) [(C)] of this paragraph, if the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following requirements apply:

(i) the amount of emission credits from a facility or mobile source, in tons per year, will be determined and certified based on quantification methodologies at least as stringent as the methods used to demonstrate compliance with any applicable requirements for the facility or mobile source;

(ii) the generator shall collect relevant data sufficient to characterize the facility's or mobile source's emissions of the affected pollutant and

the facility's or mobile source's activity level for all representative phases of operation in order to characterize the facility's or mobile source's baseline emissions;

(iii) the owner or operator of a facility with a continuous emissions monitoring system or predictive emissions monitoring system in place shall use this data in quantifying emissions;

(iv) the chosen quantification protocol must be made available for public comment for a period of 30 days and must be viewable on the commission's website;

(v) the chosen quantification protocol and any comments received during the public comment period must be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols may not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA adopts disapproval of the protocol in the *Federal Register*.

(2) If the monitoring and testing data specified in paragraph (1) of this subsection is missing or unavailable, the generator or user shall determine the facility's emissions for the period of time the data is missing or unavailable using the most

conservative method for replacing the data and these listed methods in the following order:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

(E) EPA Compilation of Air Pollution Emission Factors (AP-42),
September 2000; or

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator or user shall submit the justification for not using the methods in paragraph (1) of this subsection and submit the justification for the method used.

(f) [(e)] Credit certification.

(1) The amount of emission credits in tons per year will be determined and certified to the nearest tenth of a ton per year. Credits will not be issued for an individual facility, fugitive emissions from aggregated facilities, or aggregated mobile sources that cannot generate at least 0.1 ton per year of credit after all adjustments are applied. Fugitive emissions or mobile source emissions aggregated to meet the requirement that emission reductions be certified for at least 0.1 ton per year must be represented on the same application and will have an application deadline and credit expiration date determined by the earliest emission reduction date among the aggregated sources.

(2) The executive director shall review an application for certification to determine the credibility of the reductions. Each ERC or MERC certified will be assigned a certificate number. A new number will be assigned when an ERC or MERC is traded or partly used. Reductions determined to be creditable and in compliance with all other requirements of this division will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the emission credit application. The applicant may submit a revised application in accordance with the requirements of this division. If a facility's or mobile source's actual emissions exceed any applicable local, state, or federal requirement, reductions of emissions exceeding the requirement may not be certified as emission credits. An application for certification of emission credit from reductions quantified under

subsection (e)(1)(E) [(d)(1)(D)] of this section may only be approved after the EPA's 45-day adequacy review of the protocol.

(g) Credit application submission and conditions.

(1) Beginning January 1, 2018, an application to certify credits must be submitted through the State of Texas Environmental Reporting System (STEERS) unless the applicant receives prior approval from the executive director for an alternative means of application submission.

(2) As a condition for the certification of a credit, the executive director may specify monitoring, testing, recordkeeping, or other requirements through an Emissions Banking and Trading Certification of Emission Reductions Form (Form EBT-CERT), or other forms considered equivalent by the executive director.

(3) The generator must comply with all conditions specified in a Form EBT-CERT, or other forms considered equivalent by the executive director, once the credit is certified.

(h) [(f)] Geographic scope. Except as provided in §101.305 of this title (relating to Emission Reductions Achieved Outside the United States), only emission reductions generated in nonattainment areas can be certified. An emission credit must be used in

the nonattainment area in which it is generated unless the user has obtained prior written approval of the executive director and the EPA; and

(1) a demonstration has been made and approved by the executive director and the EPA to show that the emission reductions achieved in another county or state provide an improvement to the air quality in the county of use; or

(2) the emission credit was generated in a nonattainment area that has an equal or higher nonattainment classification than the nonattainment area of use, and a demonstration has been made and approved by the executive director and the EPA to show that the emissions from the nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the nonattainment area of use.

(i) [(g)] Recordkeeping. The generator shall maintain a copy of all notices and backup information submitted to the executive director and all records required or necessary to verify the certified emissions reduction for a minimum of five years. The user shall maintain a copy of all notices and backup information submitted to the executive director from the beginning of the use period and for at least five years after. The user shall make the records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records must include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each facility or any other identifying number for each mobile source using emission credits;

(2) the amount of emission credits being used by each facility or mobile source; and

(3) the certificate number of emission credits used for each facility or mobile source.

(j) [(h)] Public information. All information submitted with notices, reports, and trades regarding the nature, quantity, and sales price of emissions associated with the use, generation, and transfer of an emission credit is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information, may result in the rejection of the emission credit application. All nonconfidential information will be made available to the public as soon as practicable.

(k) [(i)] Authorization to emit. An emission credit created under this division is a limited authorization to emit the pollutants identified in subsection (a) of this section, unless otherwise defined, in accordance with the provisions of this section, 42 United States Code, §§7401 *et seq.*, and Texas Health and Safety Code, Chapter 382, as well as regulations promulgated thereunder. An emission credit does not constitute a property

right. Nothing in this division may be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(l) [(j)] Program participation. The executive director has the authority to prohibit a person from participating in emission credit trading either as a generator or user, if the executive director determines that the person has violated the requirements of the program or abused the privileges provided by the program.

(m) [(k)] Compliance burden. A user may not transfer their compliance burden and legal responsibilities to a third-party participant. A third-party participant may only act in an advisory capacity to the user.

(n) [(l)] Credit ownership. The owner of the initial emission credit shall be the owner or operator of the facility or mobile source creating the emission reduction. The executive director may approve a deviation from this subsection considering factors such as, but not limited to:

(1) whether an entity other than the owner or operator of the facility or mobile source incurred the cost of the emission reduction strategy; or

(2) whether the owner or operator of the facility or mobile source lacks the potential to generate 0.1 [1/10] ton per year of credit after all adjustments are applied.

§101.303. Emission Reduction Credit Generation and Certification.

(a) Emission reduction strategy.

(1) An emission reduction credit (ERC) may be generated using one of the following strategies or any other method that is approved by the executive director:

(A) the permanent shutdown of a facility that causes a loss of capability to produce emissions;

(B) the installation and operation of pollution control equipment that reduces emissions below baseline emissions for the facility;

(C) a change in a manufacturing process that reduces emissions below baseline emissions for the facility;

(D) a permanent curtailment in production that reduces the facility's capability to produce emissions; or

(E) pollution prevention projects that produce surplus emission reductions.

(2) An ERC may not be generated from the following strategies:

(A) reductions from the shifting of activity from one facility to another facility at the same site;

(B) that portion of reductions funded through state or federal programs, unless specifically allowed under that program; [or]

(C) reductions from a facility without state implementation plan (SIP) emissions; or [.]

(D) reductions from the shutdown of specific types of inelastic area sources that are driven by population needs. The executive director shall maintain a public list of area source categories determined to be inelastic categories.

(i) The list of inelastic area source categories will be made available to the public on the commission's website.

(ii) Any person may submit a written petition requesting that the executive director add or remove a category from the list.

(iii) Within 60 days of receiving a petition under clause (ii) of this subparagraph, the executive director shall prepare a draft revised list or propose

denial of the petition by preparing a draft denial statement supporting denial of the petition.

(iv) The executive director may on its own motion propose revisions to the list by preparing a draft revised list.

(v) The executive director's draft revised list, or draft denial statement, under clauses (iii) and (iv) of this subparagraph shall be made available for public comment for 30 days.

(vi) Within 30 days of the public comment period ending, the executive director shall issue a proposed final list or a proposed final denial statement for consideration and approval by the commission.

(vii) The commission shall approve, modify, or deny the proposed revisions to the list of inelastic area sources categories made by the executive director under clauses (iii) and (iv) of this subparagraph.

(viii) The commission shall approve, modify, or remand to the executive director for further consideration a recommendation to deny a petition submitted by the executive director under clause (iii) of this subparagraph.

(ix) The shutdown of an area source category that falls into one of the categories on the list under clause (i) of this subparagraph is ineligible for emissions reduction credit generation.

(b) ERC baseline emissions.

(1) The baseline emissions may not exceed the facility's SIP emissions.

(2) The activity and emission rate used to calculate the facility's historical adjusted emissions must be determined from the same two consecutive calendar years [selected from the ten consecutive years immediately before the emission reduction is achieved].

(A) For point sources, the historical adjusted emissions must be based on two consecutive calendar years from the ten consecutive years immediately before the emissions reduction is achieved.

(B) For area sources, the historical adjusted emissions must be based on two consecutive years from the five consecutive years immediately before the emissions reduction is achieved unless detailed operational records are available for more than five years. The historical adjusted emissions may be determined from two consecutive calendar years up to six to ten consecutive years immediately before the

emissions reduction is achieved when detailed operational records are available for those years.

(3) For a facility in existence less than 24 months or not having two complete calendar years of activity data, a shorter period of not less than 12 months may be considered by the executive director.

(c) ERC calculation.

(1) The quantity of ERCs is determined by subtracting the facility's strategic emissions from the facility's baseline emissions, as calculated in the following equation.

Figure: 30 TAC §101.303(c)(1)

[Figure: 30 TAC §101.303(c)]

$$ERC = BE - SE$$

Where:

ERC = The amount of emission reduction credits generated, in tenths of a ton per year.

BE = The facility's baseline emissions, which is the lowest of the historical adjusted emissions or the state implementation plan emissions.

SE = The facility's strategic emissions, which is the enforceable emission limit for the facility after implementation of the emission reduction strategy.

(2) For area sources generating credits from the permanent shutdown of a facility, the amount of ERCs calculated will be reduced by 15% or 0.1 ton per year, whichever is greater.

(3) For area sources, the amount of ERCs calculated will be adjusted to account for the quality of the data used to quantify the emissions. The adjustment will be:

(A) no reduction for the same type of records that are required to be maintained for a facility operating as a point source; or

(B) 15% or 0.1 ton per year, whichever is greater, reduction for records supporting alternative methods approved according to §101.302(e) of this title (relating to General Provisions).

(4) If the facility is subject to both of the adjustments in paragraphs (1) and (2) of this subsection, the total combined adjustment to the amount of ERCs issued will be a reduction of 20% or 0.1 ton per year, whichever is greater.

(d) ERC certification.

(1) The owner or operator of a facility with potential ERCs shall submit an application form specified by the executive director and signed by an authorized

account representative as specified in subparagraphs (A) - (D) of this paragraph [to the executive director an application for ERCs no more than two years after the implementation of the emission reduction strategy].

(A) Applications will be reviewed to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and an ERC will be issued to the owner.

(B) The application for ERCs must be submitted no more than two years after the facility's emissions reduction date, except as provided by subparagraphs (C) and (D) of this paragraph.

(C) The application for ERCs from all facilities affected by a complete site shutdown of an oil and gas production site may be submitted no more than two years after the site's production well is plugged in accordance with requirements of the Railroad Commission of Texas if the plugging is completed within one year of final production being reported to the Railroad Commission of Texas. Emission credits certified under this exception will be available for use for 72 months from the date well plugging is completed in lieu of the provisions outlined in §101.309(b)(2) of this title (relating to Emission Credit Banking and Trading).

(D) For an area source facility, the application for ERCs may be submitted as follows.

(i) For emission reductions that occurred after June 1, 2013 and prior to January 1, 2015, the application for ERCs must be submitted by December 31, 2017.

(ii) For emissions reductions that occurred between January 1, 2015 and January 1, 2017, the application for ERCs may be submitted up to three years after the facility's emissions reduction date.

(iii) The application deadline exceptions specified in clauses (i) and (ii) of this subparagraph no longer apply after December 31, 2019.

(iv) Emission credits certified under the application deadline exceptions specified in clauses (i) and (ii) of this subparagraph or certified for area source emission reductions occurring before and included on an application submitted, but not acted on, before January 1, 2017 shall be available for use for 72 months from the date of the emission reduction in lieu of the provisions outlined in §101.309(b)(2) of this title.

(2) ERCs must be quantified in accordance with §101.302(e) [§101.302(d)] of this title [(relating to General Provisions)]. The executive director shall have the authority to inspect and request information to assure that the emissions reductions have actually been achieved.

(3) An application for ERCs must include, but is not limited to, a completed application form specified by the executive director signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

(A) a complete description of the emission reduction strategy;

(B) the amount of ERCs generated;

(C) for volatile organic compound reductions, a list of the specific compounds reduced;

(D) documentation supporting the activity, emission rate, historical adjusted emissions, SIP emissions, baseline emissions, and strategic emissions;

(E) for point sources, emissions inventory data for [each of] the years used to determine the SIP emissions and historical adjusted emissions;

(F) the most stringent emission rate and the most stringent emission level, considering all applicable local, state, and federal requirements;

(G) a complete description of the protocol used to calculate the emission reduction generated; and

(H) the actual calculations performed by the generator to determine the amount of ERCs generated.

(4) ERCs will be made enforceable by one of the following methods:

(A) amending or altering a new source review permit to reflect the emission reduction and set a new maximum allowable emission limit;

(B) voiding a new source review permit when a facility has been shut down; or

(C) for any facility without a new source review permit that is otherwise authorized by commission rule, certifying the emission reduction and the new maximum emission limit on one or more forms specified by the executive director, including a Certification of Emission Limits (Form APD-CERT) submitted through e-permitting and an Emissions Banking and Trading Certification of Emission Reductions Form (Form EBT-CERT), or other forms [form] considered equivalent by the executive director [or an agreed order].

§101.304. Mobile Emission Reduction Credit Generation and Certification.

(a) Methods of generation.

(1) Mobile emission reduction credits (MERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under these rules and subject to the approval of the executive director [commission].

(2) MERCs may not be generated from the following strategies:

(A) that portion of reductions funded through a state or federal program, unless specifically allowed under that program;

(B) through the transfer of emissions from one mobile source to another mobile source within the same nonattainment area and under common ownership or control; [or]

(C) reduction strategies resulting in secondary emissions increases that exceed limits established under state or federal rules or regulations; or [.]

(D) the shutdown or replacement of a mobile source unless that source is rendered permanently inoperable or permanently removed from North America.

(b) MERC baseline emissions.

(1) Mobile source baseline emissions shall be calculated with either measured emissions of an appropriately sized sample of the participating mobile sources using a United States Environmental Protection Agency (EPA)-approved test procedure, or by estimating emissions of the participating mobile sources using the most recent edition of the EPA on-road or non-road mobile emissions factor models or other model as applicable.

(2) The historical adjusted emissions and state implementation plan emissions may only include actual emissions that occurred when the mobile source was operating inside a specific nonattainment area. [(2) Mobile source baseline emissions for each year of the proposed mobile source reduction strategy must be the same as, or lower than, those used or proposed to be used in the state implementation plan (SIP) in which the reduction strategy is proposed.]

(3) The activity and emissions rate data used to calculate the mobile source's historical adjusted emissions must be determined from two consecutive calendar years from the five consecutive years immediately before the emissions reduction is achieved unless detailed operational records are available for more than five years. If these detailed operational records are available and do not demonstrate decreasing use due to vehicle age or inoperability, the historical adjusted emissions for

a mobile source may be determined from two consecutive calendar years up to six to ten consecutive years immediately before the emissions reduction is achieved.

(4) For a mobile source in existence less than 24 months or not having two complete calendar years of activity data, a shorter period of not less than 12 months may be approved by the executive director.

(5) [(3)] Baseline emissions for quantifying MERCs should include, but not be limited to, the following information and data as appropriate:

(A) the emission standard to which the mobile source is subject or the emission performance standard to which the mobile source is certified;

(B) the estimated or measured in-use emissions levels per unit of use from all significant mobile source emissions sources;

(C) the number of mobile sources in the participating group;

(D) the type or types of mobile sources by model year;

(E) the actual or projected activity level, hours of operation, or miles traveled, by type and model year; and

(F) the projected remaining useful life of the participating group of mobile sources.

(c) MERC calculation. The quantity of MERCs must be calculated from the [annual] difference between the mobile source baseline emissions and the strategic [projected] emissions [level after the MERC strategy has been put in place]. The strategic [projected] emissions must be based on the best estimate of the actual in-use emissions of the modified or substitute on-road or non-road vehicles or transportation system that will occur when the mobile source is operating inside a specific nonattainment area. Any estimate of a strategic [projected annual mobile source] emissions level based on an assumption of reduced consumer service or transportation service would not be allowed without the support of a convincing analytical justification of the assumption.

(1) For mobile sources generating credits from a shutdown, the amount of MERCs generated will be reduced by 15% or 0.1 ton per year, whichever is greater.

(2) The amount of MERCs generated will be adjusted to account for the quality of the data used to quantify the emissions. The reduction will be 15% or 0.1 ton per year, whichever is greater, for records supporting alternative methods approved according to §101.302(e) of this title (relating to General Provisions).

(3) If the mobile source is subject to an adjustment based on both the reduction strategy being a shutdown and the quality of the data used to quantify the emissions, the total combined reduction to the amount of MERCs generated will be 20% or 0.1 ton per year, whichever is greater.

(d) Emission offsets. Mobile source reduction strategies that reduce emissions in one criteria pollutant or precursor for which an area is designated nonattainment, yet result in an emissions increase of another criteria pollutant or precursor for which that same area is nonattainment and from the same mobile source, must be required to offset the resulting increase at a 1:1 ratio with ERCs or MERCs.

(e) MERC certification.

(1) The generator of the reduction from a mobile source with potential MERCs shall submit an application form specified by the executive director and signed by an authorized account representative [Mobile sources with potential MERCs shall submit to the executive director an MEC-1 Form, Application for Mobile Emission Credits, within 180 days of implementation of the strategy. Upon approval of the application, the executive director shall issue a MERC certificate(s) to the person, company, business, organization, or public entity generating the mobile emission reduction. A MERC certificate will indicate the total amount of certified emission credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires].

(A) Applications will be reviewed to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and a MERC will be issued to the owner of the mobile source except as specified in §101.302(n) of the title.

(B) The application for MERCs must be submitted no more than two years after the date of the emissions reduction, except as provided by subparagraph (C) of this paragraph.

(C) For a mobile source, the application for MERCs may be submitted as follows.

(i) For emission reductions that occurred after June 1, 2013 and prior to January 1, 2015, the application for MERCs must be submitted by December 31, 2017.

(ii) For emissions reductions that occurred between January 1, 2015 and January 1, 2017, the application for MERCs may be submitted up to three years after the date of the emissions reduction.

(iii) The application deadline exceptions specified in clauses (i) and (ii) of this subparagraph no longer apply after December 31, 2019.

(iv) Emission credits certified under the application deadline exceptions specified in clauses (i) and (ii) of this subparagraph or certified for mobile source emission reductions occurring before and included on an application submitted, but not acted on, before January 1, 2017 shall be available for use for 72 months from the date of the emission reduction in lieu of the provisions outlined in §101.309(b)(2) of this title (relating to Emission Credit Banking and Trading).

(2) MERCs will be determined and certified in accordance with §101.302(e) [§101.302(d)] of this title (relating to General Provisions) using:

(A) EPA methodologies, when available;

(B) actual monitoring results, when available;

(C) calculations using the most current EPA mobile emissions factor model or other model as applicable; or

(D) calculations using creditable emission reduction measurement or estimation methodologies that satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies.

(3) The expected remaining useful life of the mobile source shall be determined based on the assumptions used in the models in the applicable state implementation plan (SIP) revision or on a case-by-case basis approved by the executive director when a type of mobile source is not reflected in these models. Except as provided in paragraph (4) of this subsection, the amount of MERCs certified for a given emissions reduction will be determined by the emissions reduction for the expected remaining useful life of the mobile source(s), annualized over 25 years.

(4) The requirement to consider the expected remaining useful life of the mobile source and to annualize the emissions reduction over 25 years, as described in paragraph (3) of this subsection, does not apply if a capture and control system is used to reduce mobile source emissions. Instead, the MERC calculation will include the following.

(A) The strategic emissions used in the MERC calculation must include the mobile source emissions that are not captured by the capture and control system. In addition, the strategic emissions must also include any emissions that are not controlled by the system after capture and any emissions caused by or as a result of operating the system.

(B) The initial owner of the MERCs is the owner or operator of the capture and control system.

(5) [(3)] An application for MERCs must include, but is not limited to, a form specified by the executive director that is [completed MEC-1 Form] signed by an authorized account representative, [of the applicant] along with the following information for each pollutant reduced by each applicable mobile source:

(A) the date of the reduction;

(B) a complete description of the generation strategy;

(C) the amount of emission credits generated;

(D) documentation supporting the mobile source baseline activity, mobile source baseline emission rate, historical adjusted emissions, SIP emissions, mobile source baseline emissions, and the mobile source strategy emissions;

(E) a complete description of the protocol used to calculate the emission reduction generated;

(F) the actual calculations performed by the generator to determine the amount of emission credits generated; and

(G) a demonstration that the reductions are surplus to all local, state, and federal rules and to emission modeled in the SIP.

(6) [(4)] MERCs will be made enforceable with an Emissions Banking and Trading Certification Form (Form EBT-CERT), or equivalent form approved by the executive director, that may contain special conditions including, but not limited to:
[by obtaining an agreed order that sets a new maximum allowable mobile source emission limit.]

(A) written certification and photographs for mobile sources that are made permanently inoperable for replacement or shutdown;

(B) where applicable, a certified or duplicate Texas Nonrepairable Vehicle Title for mobile sources that are made permanently inoperable for replacement or shutdown;

(C) a bill of sale and bill of lading for mobile sources that are permanently removed from North America for replacement or shutdown and any additional information required by the executive director; and

(D) a new maximum allowable mobile source emission limit.

§101.306. Emission Credit Use.

(a) Uses for emission credits. Unless precluded by a commission order or a condition or conditions within an authorization under the same commission account number, emission credits may be used as the following:

(1) offsets for a new source, as defined in §101.1 of this title (relating to Definitions), or major modification to an existing source;

(2) mitigation offsets for action by federal agencies under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans;

(3) an alternative means of compliance with volatile organic compound and nitrogen oxides reduction requirements to the extent allowed in Chapters 115 and 117 of this title (relating to Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds);

(4) reductions certified as emission credits may be used in netting by the original applicant, if not used, sold, reserved for use, or otherwise relied upon, as provided by Chapter 116, Subchapter B of this title (relating to New Source Review Permits); or

(5) compliance with other requirements as allowed in any applicable local, state, and federal requirement.

(b) Credit use calculation.

(1) The number of emission credits needed by the user for offsets shall be determined as provided by Chapter 116, Subchapter B of this title.

(2) For emission credits used in compliance with Chapter 115 or 117 of this title, the number of emission credits needed should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

Figure: 30 TAC §101.306(b)(2) (No change to the figure as it currently exists in TAC.)

(3) For emission credits used to comply with §§117.123, 117.320, 117.323, 117.423, 117.1020, or 117.1220 of this title (relating to Source Cap; and System Cap), the number of emission credits needed for increasing the 30-day rolling average emission cap or maximum daily cap should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

Figure: 30 TAC §101.306(b)(3) (No change to the figure as it currently exists in TAC.)

(4) Emission credits used for compliance with any other applicable program should be determined in accordance with the requirements of that program and must contain at least 10% extra to be retired as an environmental contribution, unless otherwise specified by that program.

(c) Notice of intent to use emission credits.

(1) [Application to use ERCs.] The executive director will not accept an application to use emission credits [ERCs] before the emission credit [ERC] is available in the compliance account for the site where it will be used. If the emission credit [ERC] will be used for offsets, the executive director will not accept the emission credit [ERC] application before the applicable permit application is administratively complete.

(A) The user shall submit a completed application at least 90 days before the start of operation for an emission credit [ERC] used as offsets in a permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) The user shall submit a completed application at least 90 days before the planned use of an emission credit [ERC] for compliance with the requirements of Chapter 115 or 117 of this title or other programs.

(C) If the executive director approves the emission credit [ERC] use, the date the application is submitted will be considered the date the emission credit [ERC] is used.

[(2) Application to use mobile emission reduction credits (MERCs).]

[(A) For MERCs which are to be used as offsets in a New Source Review permit in accordance with Chapter 116 of this title, the MERCs must be identified prior to permit issuance. Prior to construction, the offsets must be provided through submittal of a completed application form specified by the executive director.]

[(B) For emission credits that are to be used for compliance with the requirements of Chapter 115 or 117 of this title or other programs, the user must submit a completed application at least 90 days prior to the planned use of the MERC. MERCs may be used only after the executive director grants approval of the notice of intent to use. The user must also keep a copy of the notice and all backup in accordance with §101.302(g) of this title (relating to General Provisions).]

(2) [(3)] If the executive director denies the facility or mobile source's use of emission credits, any affected person may file a motion for reconsideration within 60 days of the denial. Notwithstanding the applicability provisions of §50.31(c)(7) of this title (relating to Purpose and Applicability), the requirements of §50.39 of this title

(relating to Motion for Reconsideration) shall apply. Only an affected person may file a motion for reconsideration.

(d) Inter-pollutant use of emission credits [ERCs]. With prior approval from the executive director and the United States Environmental Protection Agency, a nitrogen oxides or volatile organic compound emissions credit [ERC] may be used to meet the offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT PROGRAM

§§101.370, 101.372 – 101.374, 101.376

Statutory Authority

The amended sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The rulemaking is proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions

measurements; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended sections are also proposed under THSC, §382.023, concerning Orders, and §382.036, concerning Cooperation and Assistance. The rulemaking is also proposed under Federal Clean Air Act (FCAA), 42 United States Code, §§7401, et seq., which requires states to submit SIP revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.017, 382.021, 382.023, and 382.036.

§101.370. Definitions.

Unless specifically defined in the Texas Clean Air Act or in §3.2 or §101.1 of this title (relating to Definitions), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition, the following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise.

(1) Activity--The amount of activity at a facility or mobile source measured in terms of production, use, raw materials input, vehicle miles traveled, or

other similar units that have a direct correlation with the economic output and emission rate of the facility or mobile source.

(2) Actual emissions--The total emissions during a selected time period, using the facility's or mobile source's actual daily operating hours, production rates, or types of materials processed, stored, or combusted during that selected time period.

(3) Area source--Any facility included in the agency emissions inventory under the area source category.

(4) Baseline emissions--The facility's emissions, in tons per year, [occurring] before implementation of an emission reduction [strategy] and calculated as the lowest of the facility's historical adjusted emissions or state implementation plan (SIP) emissions, except that the SIP emissions value is only considered for a facility in a nonattainment area.

(5) Certified--Any emission reduction that is determined to be creditable upon review and approval by the executive director.

(6) Curtailment--A reduction in activity level at any facility or mobile source.

(7) Discrete emission credit--A discrete emission reduction credit or mobile discrete emission reduction credit.

(8) Discrete emission reduction credit--A certified emission reduction that is created by reducing emissions from a facility during a generation period, quantified after the generation period, and expressed in tenths of a ton.

(9) Emission rate--The facility's rate of emissions per unit of activity.

(10) Emission reduction--A [An actual] reduction in actual emissions from a facility or mobile source.

(11) Emission reduction strategy--The method implemented to reduce the facility's or mobile source's emissions beyond that required by state or federal law, regulation, or agreed order.

(12) Facility--As defined in §116.10 of this title (relating to General Definitions).

(13) Generation period--The discrete period of time, not exceeding 12 months, over which a discrete emission [reduction] credit is created.

(14) Generator--The owner or operator of a facility or mobile source that creates an emission reduction.

(15) Historical adjusted emissions--The [facility's] emissions occurring before implementation of an emission reduction strategy and adjusted for any local, state, or federal requirement, calculated using the following equation.

Figure: 30 TAC §101.370(15)

[Figure: 30 TAC §101.370(15)]

$$E_H = \frac{(A_1 \times ER_1) + (A_2 \times ER_2)}{2}$$

Where:

E_H = The historical adjusted emissions for a facility.

A_1 = The [facility's] activity during the first of any two consecutive calendar years selected in accordance with §101.373(b)(2) or §101.374(b)(3) of this title (relating to Discrete Emission Reduction Credit Generation and Certification), not to exceed any applicable local, state, or federal requirement.

ER_1 = The [facility's] emission rate during the first of any two consecutive calendar years selected in accordance with §101.373(b)(2) or §101.374(b)(3) of this title, not to exceed any applicable local, state, or federal requirement.

A_2 = The [facility's] activity during the second of any two consecutive calendar years selected in accordance with §101.373(b)(2) or §101.374(b)(3) of this title, not to exceed any applicable local, state, or federal requirement.

ER_2 = The [facility's] emission rate during the second of any two consecutive calendar years selected in accordance with §101.373(b)(2) or §101.374(b)(3) of this title, not to exceed any applicable local, state, or federal requirement.

(16) Mobile discrete emission reduction credit--A certified emission reduction from a mobile source or group of mobile sources that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tenths of a ton [tons].

(17) Mobile source--A source included in the agency's emissions inventory under the mobile source category [On-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels)].

(18) Mobile source baseline activity--The level of activity of a mobile source during the applicable mobile source baseline emissions period.

(19) Mobile source baseline emissions--The mobile source's actual emissions, in tons per year, occurring prior to a mobile emission reduction strategy calculated as the lowest of the historical adjusted emissions or state implementation plan emissions [product of mobile source baseline activity and mobile source baseline emission rate not to exceed all limitations required by applicable local, state, and federal rules and regulations].

(20) Mobile source baseline emissions rate--The mobile source's rate of emissions per unit of mobile source baseline activity during the mobile source baseline emissions period.

(21) Ozone season--The portion of the year when ozone monitoring is federally required to occur in a specific geographic area, as defined in 40 Code of Federal Regulations Part 58, Appendix D, §2.5.

(22) Point source--A facility included in the agency's emissions inventory under the point source category.

(23) Primarily operated--When the activity is at least 85% within a specific nonattainment area.

(24) Projection-base year--The year of the emissions inventory used to project or forecast future-year emissions for modeling point sources in a state implementation plan revision.

(25) [(22)] Protocol--A replicable and workable method of estimating emission rates or activity levels used to calculate the amount of emission reduction generated or credits required for facilities or mobile sources.

(26) [(23)] Quantifiable--An emission reduction that can be measured or estimated with confidence using replicable methodology.

(27) [(24)] Real reduction--A reduction in which actual emissions are reduced. Emissions reductions that result from any of the following are not considered a real reduction:

(A) lowering the allowable emission limit in a permit without a physical change or change in method of operation;

(B) shifting a vent gas stream or other pollution or waste stream to another site;

(C) a mobile source that is not capable of being operated as intended; or

(D) a change in an emissions factor or emissions calculation equation.

(28) [(25)] Shutdown--The cessation of an activity producing emissions at a facility or mobile source.

(29) [(26)] Site--As defined in §122.10 of this title (relating to General Definitions).

(30) [(27)] State implementation plan--A plan that provides for attainment and maintenance of a primary or secondary national ambient air quality standard as adopted in 40 Code of Federal Regulations Part 52, Subpart SS.

(31) State implementation plan (SIP) emissions--SIP emissions are determined as follows.

(A) For point sources, SIP emissions are facility-specific values based on the emissions data in the state's annual emissions inventory (EI) for the year used to develop the projection-base year inventory for the modeling included in an attainment demonstration (AD) SIP revision, used for the attainment inventory for a maintenance plan SIP revision, or used in an EI SIP revision, as applicable under subparagraph (B)(i) - (iv) of this paragraph. For area and mobile sources, SIP emissions are calculated values based on actual operations during the latest triennial National Emissions Inventory year used to develop the modeling included in an AD SIP revision, used for the attainment inventory for a maintenance plan SIP revision, or used in an EI SIP revision, as applicable under subparagraph (B)(i) - (iv) of this paragraph.

(B) The applicable SIP revision must be for the nonattainment area where the facility is located, or for mobile sources where the mobile source is primarily

operated, and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. The applicable SIP revision is:

(i) an AD SIP revision or a maintenance plan SIP revision, whichever was most recently submitted to the United States Environmental Protection Agency (EPA) for the current National Ambient Air Quality Standard (NAAQS);

(ii) if the SIP revisions identified in clause (i) of this subparagraph have not been submitted to the EPA, an AD SIP revision or a maintenance plan SIP revision, whichever was most recently submitted to the EPA for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS;

(iii) if the SIP revisions identified in clauses (i) and (ii) of this subparagraph have not been submitted to the EPA, the most recent EI SIP revision submitted to the EPA; or

(iv) if the SIP revisions identified in clauses (i) - (iii) of this subparagraph have not been submitted to the EPA, the EI SIP revision that will be submitted to the EPA.

(C) The total amount of SIP emissions available for credit generation will be set for area, non-road mobile, and on-road mobile source categories.

(i) Total creditable area source emissions are 75% of the total area source emissions excluding residential area sources in the applicable SIP revision.

(ii) Total creditable non-road mobile source emissions are 75% of the total non-road mobile source emissions in the applicable SIP revision.

(iii) Total creditable on-road mobile source emissions are 85% of the total on-road mobile source emissions in the applicable SIP revision.

(D) The SIP emissions for a facility or mobile source may not exceed any applicable local, state, or federal requirement.

(E) The year used to determine SIP emissions is as specified in subparagraph (A) of this paragraph, unless a different year is specifically identified otherwise by the commission in the most recent SIP revision adopted after December 31, 2017.

[(28) State implementation plan (SIP) emissions--The emissions data in the state's emissions inventory (EI) required under 40 Code of Federal Regulations Part 51, Subpart A for the year used to represent the facility's emissions in a SIP revision. The

applicable SIP revision must be for the nonattainment area where the facility is located and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. The SIP emissions may not exceed any applicable local, state, or federal requirement. A facility's SIP emissions are determined from the EI year that:]

[(A) was used to develop the projection-base year inventory for the modeling included in an attainment demonstration (AD) SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the United States Environmental Protection Agency (EPA) for the current National Ambient Air Quality Standard (NAAQS);]

[(B) if the SIP revisions identified in subparagraph (A) of this paragraph have not been submitted to the EPA, was used to develop the projection-base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the EPA for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS;]

[(C) if the SIP revisions identified in subparagraphs (A) and (B) of this paragraph have not been submitted to the EPA, corresponds to the EI for the most recent EI SIP revision submitted to the EPA; or]

[(D) if the SIP revisions identified in subparagraphs (A) - (C) of this paragraph have not been submitted to the EPA, corresponds to the EI that will be used for the EI SIP revision that will be submitted to the EPA.]

(32) [(29)] Strategy activity--The facility's or mobile source's level of activity during the discrete emission reduction credit generation period.

(33) [(30)] Strategy emission rate--The facility's or mobile source's emission rate during the discrete emission reduction credit generation period.

(34) [(31)] Surplus--An emission reduction that is not otherwise required of a facility or mobile source by any applicable local, state, or federal requirement and has not been otherwise relied upon in the state implementation plan.

(35) [(32)] Use period--The period of time over which the user applies discrete emission credits to an applicable emission reduction requirement.

(36) [(33)] User--The owner or operator of a facility or mobile source that acquires and uses discrete emission reduction credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

(37) [(34)] Use strategy--The compliance requirement for which discrete emission credits are being used.

§101.372. General Provisions.

(a) Applicable pollutants.

(1) A discrete emission [reduction] credit [(DERC)] may be generated from a reduction of a criteria pollutant, excluding lead, or a precursor of a criteria pollutant.

(2) A discrete emission credit [DERC] generated from the reduction of one pollutant or precursor may not be used to meet the requirements for another pollutant or precursor, except as provided in §101.376 of this title (relating to Discrete Emission Reduction Credit Use).

[(2) Reductions of volatile organic compounds (VOC), nitrogen oxides (NO_x), carbon monoxide (CO), sulfur dioxide (SO₂) and particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns (PM₁₀) may qualify as mobile discrete emission reduction credits (MDERCs) as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, unless urban airshed modeling demonstrates that one may be substituted for another subject to approval by the executive director and the United States Environmental Protection Agency (EPA).]

(b) Eligible generator categories. Eligible categories include the following:

(1) facilities, (including point and area sources);

(2) mobile sources; or

(3) any facility, including area sources, or mobile source associated with actions by federal agencies under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans.

(c) Ineligible generator categories. The following categories are not eligible to generate discrete emission credits:

(1) residential area sources;

(2) facilities or mobile sources that do not have records for approved or approvable methods to quantify emissions;

(3) on-road mobile sources that are not part of an industrial, commercial, nonprofit, institutional, or municipal/government fleet; and

(4) mobile sources within a nonattainment area that do not primarily operate within th at nonattainment area with the exception of marine and locomotive sources that use capture and control emissions reduction systems.

(d) [(c)] Discrete emission credit requirements.

(1) A DERC is a certified emission reduction that:

(A) must be real, quantifiable, and surplus at the time the DERC is generated;

(B) must occur after the year used to determine the state implementation plan (SIP) emissions for a facility in a nonattainment area; and

(C) must occur at a facility with SIP emissions [reported before implementation of the emission reduction strategy] for a facility in a nonattainment area. Individual facilities in a nonattainment area that were not operated during the year of the SIP emissions may not be used to generate DERCs.

(2) To be creditable as an MDERC, an emission reduction must meet the following:

(A) the reduction must be real, quantifiable, and surplus at the time it is created;

(B) the reduction must have occurred after the SIP emissions year for a mobile source in a nonattainment area [most recent year of emissions inventory used in the SIP for all applicable pollutants]; and

(C) for a mobile source in a nonattainment area, the mobile source [source's emissions] must have operated during the SIP emissions year. [been represented in the emissions inventory used for the SIP; and]

[(D) the mobile sources must have been included in the attainment demonstration baseline emissions inventory. If a mobile reduction implemented is not in the baseline for emissions, this reduction does not constitute a discrete emission reduction.]

(3) Emission reductions from a facility or mobile source [which are] certified as discrete emission credits under this division cannot be recertified in whole or in part as emission credits under another division within this subchapter.

(e) [(d)] Protocol.

(1) All generators or users of discrete emission credits must use a protocol which has been submitted by the executive director to the United States

Environmental Protection Agency (EPA) [EPA] for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols shall be used as follows.

(A) The owner or operator of a facility subject to the emission specifications under §§117.110, 117.310, 117.410, 117.1010, 117.1210, 117.1310, 117.2010, 117.2110, or 117.3310 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Eight-Hour Attainment Demonstration; and Emission Specifications) shall use the testing and monitoring methodologies required under Chapter 117 of this title (relating to Control of Air Pollution for Nitrogen Compounds) to show compliance with the emission specification for that pollutant.

(B) The owner or operator of a facility subject to the control requirements or emission specifications under Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) shall use the testing and monitoring methodologies required under Chapter 115 of this title to show compliance with the applicable requirements.

(C) For area sources, except as specified in subparagraphs (A) and (B) of this paragraph, the owner or operator of a facility subject to the requirements

under Chapter 106 of this title (relating to Permits by Rule) or a permit issued under Chapter 116 of this title (relating to Control Of Air Pollution By Permits For New Construction Or Modification) shall use the testing and monitoring methodologies required under Chapter 106 or a permit issued under Chapter 116 of this title to demonstrate compliance with the applicable requirements.

(D) [(C)] The executive director may approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility.

(E) [(D)] Except as specified in subparagraph (D) [(C)] of this paragraph, if the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following applies:

(i) the amount of discrete emission credits from a facility or mobile source, in tons, will be determined and certified based on quantification methodologies at least as stringent as the methods used to demonstrate compliance with any applicable requirements for the facility or mobile source;

(ii) the generator shall collect relevant data sufficient to characterize the facility's or mobile source's emissions of the affected pollutant and the facility's or mobile source's activity level for all representative phases of operation in order to characterize the facility's or mobile source's baseline emissions;

(iii) the owner or operator of a facility with a continuous emissions monitoring system or predictive emissions monitoring system in place shall use this data in quantifying emissions;

(iv) the chosen quantification protocol must be made available for public comment for a period of 30 days and must be viewable on the commission's website;

(v) the chosen quantification protocol and any comments received during the public comment period must, upon approval by the executive director, be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols may not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA proposes disapproval of the protocol in the *Federal Register*.

(2) If the monitoring and testing data specified in paragraph (1) of this subsection is missing or unavailable, the generator or user shall determine the facility's emissions for the period of time the data is missing or unavailable using the most conservative method for replacing the data and these listed methods in the following order:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

(E) EPA Compilation of Air Pollution Emission Factors (AP-42),
September 2000; or

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator or user shall submit the justification for not using the methods in paragraph (1) of this subsection and submit the justification for the method used.

(f) Credit application. Beginning January 1, 2018, a credit application must be submitted through the State of Texas Environmental Reporting System (STEERS) unless the applicant receives prior approval from the executive director for an alternative means of application submission.

(g) [(e)] Credit certification.

(1) The amount of discrete emission credits must be rounded down to the nearest tenth of a ton when generated and must be rounded up to the nearest tenth of a ton when used. An individual area source facility, aggregated fugitive emissions, or aggregated mobile sources that cannot generate at least 0.1 ton of credit after all adjustments are applied may not generate discrete emission credits. Fugitive emissions or mobile source emissions aggregated to meet the requirement that emission reductions be certified for at least 0.1 ton must be represented on the same application and will have an application deadline determined by the earliest emission reduction date among the aggregated sources.

(2) The executive director shall review an application for certification to determine the credibility of the reductions and may certify reductions. Each DERC certified will be assigned a certificate number. Reductions determined to be creditable will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the discrete emission credit notification. The applicant may submit a revised application in accordance with the requirements of this division.

(4) If a facility's or mobile source's emissions exceed any applicable local, state, or federal requirement, reductions of emissions exceeding the requirement may not be certified as discrete emission credits.

(h) [(f)] Geographic scope. Except as provided in paragraph (7) of this subsection and §101.375 of this title (relating to Emission Reductions Achieved Outside the United States), only emission reductions generated in the State of Texas may be creditable and used in the state with the following limitations.

(1) volatile organic compounds (VOC) [VOC] and nitrogen oxides (NO_x) [NO_x] discrete emission credits generated in an ozone attainment area may be used in any county or portion of a county designated as attainment or unclassified, except as specified in paragraphs (4) and (5) of this subsection and may not be used in an ozone nonattainment area.

(2) VOC and NO_x discrete emission credits generated in an ozone nonattainment area may be used either in the same ozone nonattainment area in which they were generated, or in any county or portion of a county designated as attainment or unclassified.

(3) VOC and NO_x discrete emission credits generated in an ozone nonattainment area may not be used in any other ozone nonattainment area, except as provided in this subsection.

(4) VOC discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), if generated outside of the covered attainment counties. VOC discrete emission credits generated in a nonattainment area may be used in the covered attainment counties, except those generated in El Paso.

(5) NO_x discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title, if generated outside of the covered attainment counties. NO_x discrete emission credits generated in a nonattainment area, except those generated in El Paso, may be used in the covered attainment counties.

(6) carbon monoxide (CO), sulfur dioxide (SO₂), [CO, SO₂, and PM₁₀] discrete emission credits must be used in the same metropolitan statistical area (as defined in Office of Management and Budget Bulletin Number 93-17 entitled "Revised Statistical Definitions for Metropolitan Areas" dated June 30, 1993) in which the reduction was generated.

(7) VOC and NO_x discrete emission credits generated in other counties, states, or emission reductions in other nations may be used in any attainment or nonattainment county provided a demonstration has been made and approved by the executive director and the EPA, to show that the emission reductions achieved in the

other county, state, or nation improve the air quality in the county where the credit is being used.

(i) [(g)] Ozone season. In areas having an ozone season of less than 12 months (as defined in 40 Code of Federal Regulations Part 58, Appendix D) VOC and NO_x discrete emission credits generated outside the ozone season may not be used during the ozone season.

(j) [(h)] Recordkeeping. The generator must maintain a copy of all forms and backup information submitted to the executive director for a minimum of five years, following the completion of the generation period. The user shall maintain a copy of all forms and backup information submitted to the executive director for a minimum of five years, following the completion of the use period. Other relevant reference material or raw data must also be maintained on-site by the participating facilities or mobile sources. The user must also maintain a copy of the generator's notice and backup information for a minimum of five years after the use is completed. The records must include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each facility or any other identifying number for mobile sources using discrete emission credits;

(2) the amount of discrete emission credits being used by each facility or mobile source; and

(3) the certificate number of each discrete emission credit used by each facility or mobile source.

(k) [(i)] Public information. All information submitted with notices, reports, and trades regarding the nature, quantity of emissions, and sales price associated with the use, or generation of discrete emission credits is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information may result in the rejection of the discrete emission reduction application. All nonconfidential notices and information regarding the generation, use, and availability of discrete emission credits may be obtained from the registry.

(l) [(j)] Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(m) [(k)] Program participation. The executive director has the authority to prohibit a person from participating in discrete emission credit trading either as a generator or user, if the executive director determines that the person has violated the requirements of the program or abused the privileges provided by the program.

(n) [(l)] Compliance burden and enforcement.

(1) The user is responsible for assuring that a sufficient quantity of discrete emission credits are acquired to cover the applicable facility or mobile source's emissions for the entire use period.

(2) The user is in violation of this section if the user does not possess enough discrete emission credits to cover the compliance need for the use period. If the user possesses an insufficient quantity of discrete emission credits to cover its compliance need, the user will be out of compliance for the entire use period. Each day the user is out of compliance may be considered a violation.

(3) A user may not transfer its compliance burden and legal responsibilities to a third-party participant. A third-party participant may only act in an advisory capacity to the user.

(o) [(m)] Credit ownership. The owner of the initial discrete emission credit certificate shall be the owner or operator of the mobile source creating the emission

reduction. The executive director may approve a deviation from this subsection considering factors such as, but not limited to:

(1) whether an entity other than the owner or operator of the mobile source incurred the cost of the emission reduction strategy; or

(2) whether the owner or operator of the mobile source lacks the potential to generate one tenth of a ton of credit.

§101.373. Discrete Emission Reduction Credit Generation and Certification.

(a) Emission reduction strategy.

(1) A discrete emission reduction credit (DERC) may be generated using one of the following strategies or any other method that is approved by the executive director:

(A) the installation and operation of pollution control equipment that reduces emissions below the baseline emissions for the facility; or

(B) a change in the manufacturing process, other than a shutdown or curtailment, that reduces emissions below the baseline emissions for the facility.

(2) A DERC may not be generated using the following strategies:

(A) a shutdown or curtailment of an activity at a facility, either permanent or temporary;

(B) a modification or discontinuation of any activity that is otherwise in violation of a local, state, or federal requirement;

(C) an emission reduction required to comply with any provision under 42 United States Code (USC), Subchapter I regarding tropospheric ozone, or 42 USC, Subchapter IV-A regarding acid deposition control;

(D) an emission reduction of hazardous air pollutants, as defined in 42 USC, §7412, from application of a standard promulgated under 42 USC, §7412;

(E) an emission reduction from the shifting of activity from one facility to another facility at the same site;

(F) an emission reduction credited or used under any other emissions trading program;

(G) an emission reduction occurring at a facility that received an alternative emission limitation to meet a state reasonably available control technology

requirement, except to the extent that the emissions are reduced below the level that would have been required had the alternative emission limitation not been issued;

(H) an emission reduction from a facility authorized in a flexible permit, unless the reduction is permanent and enforceable or the generator can demonstrate that the emission reduction was not used to satisfy the conditions for the facilities under the flexible permit;

(I) that portion of an emission reduction funded through a state or federal program, unless specifically allowed under that program;

(J) an emission reduction from a facility subject to Division 2, 3, or 6 of this subchapter (relating to Emissions Banking and Trading Allowances; Mass Emissions Cap and Trade Program; and Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program); or

(K) an emission reduction from a facility without state implementation plan (SIP) emissions if the facility is located in a nonattainment area.

(b) DERC baseline emissions.

(1) For a facility located in an area designated as nonattainment for a criteria pollutant, and the pollutant being reduced is either the same criteria pollutant

or a precursor of that criteria pollutant, the baseline emissions may not exceed the facility's SIP emissions. If the pollutant being reduced is not the same criteria pollutant for which the area is designated nonattainment or a precursor of that criteria pollutant, then baseline emissions are limited as specified in paragraph (3) of this subsection.

(2) The activity and emission rate used to calculate the facility's historical adjusted emissions must be determined from the same two consecutive calendar years [, selected from the ten consecutive years immediately before the emission reduction is achieved].

(A) For point sources, the historical adjusted emissions must be from any two consecutive calendar years from the ten consecutive years immediately before the emissions reduction occurs.

(B) For area sources, the historical adjusted emissions must be from any two consecutive calendar years from the five consecutive years immediately before the emissions reduction occurs unless detailed operational records are available for more than five years. The historical adjusted emissions for an area source may be determined from two consecutive calendar years up to six to ten consecutive years immediately before the emissions reduction is achieved when detailed operational records are available those years.

(3) For a facility located in an area that is not designated nonattainment for the criteria pollutant being reduced, or the pollutant being reduced is not a precursor of that criteria pollutant, the historical adjusted emissions must be determined from two consecutive calendar years that include or follow the 1990 emission inventory.

(4) For emission reduction strategies that exceed 12 months, the baseline emissions are established after the first year of generation and are fixed for the life of each unique emission reduction strategy. A new baseline must be established if the commission adopts a SIP revision for the area where the facility is located.

(5) For a facility in existence less than 24 months or not having two complete calendar years of activity data, a shorter period of not less than 12 months may be considered by the executive director.

(c) DERC calculation.

(1) DERCs are calculated according to the following equation.

Figure: 30 TAC §101.373(c)(1) (No change to the figure as it currently exists in TAC.)

(2) For area sources, the amount of DERCs calculated will be adjusted based on the quality of the data used to quantify emissions. The adjustment will be:

(A) no reduction for the same type of records that are required to be maintained by regulation or authorization for a facility operating as a point source or as a component of a point source; or

(B) a reduction of 15% or 0.1 ton, whichever is greater, for records supporting approved alternative methods according to §101.372(e) of this title (relating to General Provisions).

(3) [(2)] For a facility located in an area designated nonattainment for a criteria pollutant, and the pollutant being reduced is either the same criteria pollutant or a precursor of that criteria pollutant, the sum of the reduction generated under paragraph (1) of this subsection and the total strategy emissions must not be greater than the facility's historical adjusted emissions or SIP emissions, whichever is less.

(4) [(3)] For a facility located in an area that is not designated nonattainment for the criteria pollutant being reduced, or the pollutant being reduced is not a precursor of that criteria pollutant, the sum of the reduction generated under paragraph (1) of this subsection and the total strategy emissions must not be greater than the facility's historical adjusted emissions.

(d) DERC certification.

(1) An [The] application form specified [designated] by the executive director and signed by an authorized account representative must be submitted to the executive director no later than 90 days after the end of the generation period and no later than 90 days after completing each 12 months of generation.

(2) A DERC must be quantified in accordance with §101.372(e) [§101.372(d)] of this title (relating to General Provisions). The executive director shall have the authority to inspect and request information to assure that the emission reductions have actually been achieved.

(3) An application for DERCs must include, but is not limited to, a completed application form signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

(A) the generation period;

(B) a complete description of the generation activity;

(C) the amount of DERCs generated;

(D) for volatile organic compound reductions, a list of the specific compounds reduced;

(E) documentation supporting the activity, emission rate, historical adjusted emissions, SIP emissions, strategy emission rate, and strategy activity;

(F) for point sources emissions inventory data for [each of] the years used to determine the SIP emissions and historical adjusted emissions;

(G) the most stringent emission rate for the facility, considering all applicable local, state, and federal requirements;

(H) a complete description of the protocol used to calculate the DERC generated; and

(I) the actual calculations performed by the generator to determine the amount of DERCs generated.

§101.374. Mobile Discrete Emission Reduction Credit Generation and Certification.

(a) Method of generation.

(1) Mobile discrete emission reduction credits (MDERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this division (relating to Discrete Emission Credit Banking

and Trading), and is subject to the approval of the executive director [commission].
The number of years that an emissions reduction strategy can be used to generate MDERCs is limited by the expected remaining useful life of the mobile source except if a capture and control system is used to reduce marine or locomotive mobile source emissions.

(2) MDERCs may not be generated from the following strategies:

(A) that portion of reductions funded through a state or federal program, unless specifically allowed under that program;

(B) through the transfer of emissions from one mobile source to another mobile source within the same nonattainment area and under common ownership or control; or

(C) reduction strategies resulting in secondary emissions increases that exceed limits established under state or federal rules or regulations.

(b) MDERC baseline emissions.

(1) Mobile source baseline emissions must be calculated with either measured emissions of an appropriately sized sample for the participating mobile sources using a United States Environmental Protection Agency (EPA)-approved test

procedure, or estimated emissions of the participating mobile sources using the most recent edition of the EPA on-road or non-road mobile emissions factor model or other model as applicable.

(2) The historical adjusted emissions and state implementation plan emissions must only include actual emissions that occurred when the mobile source was operating inside a specific nonattainment area.

(3) The activity data used to calculate mobile source's historical adjusted emissions must be from any two consecutive calendar years from the five consecutive years immediately before the emissions reduction occurs unless detailed operational records are available for more than five years. If these detailed operational records are available and do not demonstrate decreasing use due to vehicle age or inoperability, the historical adjusted emissions for a mobile source may be determined from two consecutive calendar years up to six to ten consecutive years immediately before the emissions reduction is achieved.

(4) For a mobile source in existence less than 24 months or not having two complete calendar years of activity data, a shorter period of not less than 12 months may be approved by the executive director.

[(2) Mobile source baseline emissions for each year of the proposed mobile source reduction strategy must be the same as, or lower than, those used or

proposed to be used in the state implementation plan (SIP) in which the reduction strategy is proposed.]

(5) [(3)] Baseline emissions for quantifying MDERCs should include, but not be limited to, the following information and data as appropriate:

(A) the emission standard to which the mobile source is subject or the emission performance standard to which the mobile source is certified;

(B) the estimated or measured in-use emissions levels per unit of use from all significant mobile source emissions sources;

(C) the number of mobile sources in the participating group;

(D) the type or types of mobile sources by model year; and

(E) the actual activity level, hours of operation, or miles traveled by type and model year.

(c) MDERC calculation. The quantity of MDERCs must be calculated from the annual difference between the mobile source baseline emissions and the strategy emissions. The MDERC must be based on actual in-use emissions of the modified or substitute mobile source.

(1) For mobile sources generating credits from a shutdown, the amount of MDERCs generated will be reduced by 15% or 0.1 ton, whichever is greater.

(2) The amount of MDERCs generated will be adjusted to account for the quality of the data used to quantify the emissions. The reduction will be 15% or 0.1 ton, whichever is greater, for records supporting approved alternative methods according to §101.372(e) of this title (relating to General Provisions).

(3) If the mobile source is subject to an adjustment based on both the reduction strategy being a shutdown and the quality of the data used to quantify the emissions, the total combined reduction will be 20% or 0.1 tons, whichever is greater.

(4) If a capture and control system is used to reduce mobile source emissions, the strategy emissions used in the MDERC calculation must include the mobile source emissions that are not captured by the system, any emissions that are not controlled by the system, and any emissions caused by or as a result of operating and moving the system. The initial owner of the MDERCs is the owner or operator of the capture and control system.

(d) Emission offsets. Mobile source reduction strategies that reduce emissions in one criteria pollutant or precursor for which an area is designated as nonattainment or near nonattainment, yet result in an emissions increase from the same mobile source

in another criteria pollutant or precursor for which that same area is nonattainment or near nonattainment, must be offset at a 1:1 ratio with DERCs or MERCs.

(e) MDERC certification.

(1) A designated application form signed by an authorized account representative must [An MDEC-1 Form, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits, shall] be submitted to the executive director no later than 90 days after the end of the generation period [discrete emission reduction strategy activity has been completed], or no later than 90 days after the completion of each [the first] 12 months of generation. [Submission of the MDEC-1 Form shall continue every 12 months thereafter for each subsequent year of generation.]

(2) MDERCs will be determined and certified in accordance with §101.372(e) [§101.372(d)] of this title [(relating to General Provisions)] using:

(A) EPA methodologies, when available;

(B) actual monitoring results, when available;

(C) calculations using the most current EPA mobile emissions factor model or other model as applicable; or

(D) calculations using creditable emission reduction measurement or estimation methodologies that satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies. The generator shall collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which the MDERCs are created or used.

(3) An application for MDERCs must include, but is not limited to, a completed application form [a completed MDEC-1 Form] signed by an authorized account representative, [of the applicant] along with the following information for each pollutant reduced for each mobile source:

(A) the date of the reduction;

(B) a complete description of the generation activity;

(C) the amount of discrete mobile source emission credits generated;

(D) documentation supporting the mobile source baseline activity, mobile source baseline emission rate, mobile source baseline emissions, and the mobile source strategy emissions;

(E) a complete description of the protocol used to calculate the discrete mobile source emission reduction generated;

(F) the actual calculations performed by the generator to determine the amount of discrete mobile source emission credits generated; and

(G) a demonstration that the reductions are surplus to all local, state, and federal rules and to emissions modeled in the SIP.

§101.376. Discrete Emission Credit Use.

(a) Requirements to use discrete emission credits. Discrete emission credits may be used if the following requirements are met.

(1) The user shall have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(2) The user shall hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(3) The user shall acquire additional discrete emission credits during the use period if it is determined the user does not possess enough discrete emission credits to cover the entire use period. The user shall acquire additional credits as allowed under this section prior to the shortfall, or be in violation of this section.

(4) The user may acquire and use only discrete emission credits listed in the registry.

(5) The user shall obtain executive director approval to use nitrogen oxides (NO_x) discrete emission reduction credits (DERCs) in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties as provided by subsection (f) of this section.

(6) A discrete emission credit [DERC] may not be used unless it is available in the account for the site where it will be used.

(b) Use of discrete emission credits. With the exception of uses prohibited in subsection (c) of this section or precluded by a commission order or a condition within an authorization under the same commission account number, discrete emission credits may be used to meet or demonstrate compliance with any facility or mobile regulatory requirement including the following:

(1) to exceed any allowable emission level, if the following conditions are met:

(A) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than 10 tons for nitrogen oxides or 5 tons for volatile organic compounds in a 12-month period as approved by the executive director. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested; or

(B) at permitted facilities in counties or portions of counties designated as attainment or, attainment/unclassifiable, or unclassifiable, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations (CFR) §52.21(b)(23), as approved by the executive director before use. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested;

(2) as new source review (NSR) permit offsets, if the following requirements are met:

(A) the user shall obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified facility in the NSR permit;

(B) the amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user shall also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user shall purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher; and

[(C) for the use of mobile discrete emission reduction credits, the NSR permit must meet the following requirements:]

[(i) the permit must contain an enforceable requirement that the facility obtain at least one additional year of offsets before continuing operation in each subsequent year;]

[(ii) prior to issuance of the permit, the user shall identify the discrete emission credits; and]

[(iii) prior to start of operation, the user shall submit a completed application form specified by the executive director;]

(C) [(D)] [for the use of DERCs,] the user shall submit a completed application form specified by the executive director at least 90 days before the start of operation and at least 90 days before continuing operation for any period in which discrete emission credits [DERCs] not included in a prior application will be used as offsets;

(3) to comply with the Mass Emissions Cap and Trade Program requirements as provided by §101.356(h) of this title (relating to Allowance Banking and Trading); or

(4) to comply with Chapter 115 or 117 of this title (relating to Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds), as allowed.

(c) Discrete emission credit use prohibitions. A discrete emission credit may not be used under this division:

(1) before it has been acquired by the user;

(2) for netting to avoid the applicability of federal and state NSR requirements;

(3) to meet (as codified in 42 United States Code (USC), Federal Clean Air Act (FCAA)) requirements for:

(A) new source performance standards under FCAA, §111 (42 USC, §7411);

(B) lowest achievable emission rate standards under FCAA, §173(a)(2) (42 USC, §7503(a)(2));

(C) best available control technology standards under FCAA, §165(a)(4) (42 USC, §7475(a)(4)) or Texas Health and Safety Code, §382.0518(b)(1);

(D) hazardous air pollutants standards under FCAA, §112 (42 USC, §7412), including the requirements for maximum achievable control technology;

(E) standards for solid waste combustion under FCAA, §129 (42 USC, §7429);

(F) requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3) (42 USC, §7511a(b)(4) or (c)(3));

(G) ozone control standards set under FCAA, §183(e) and (f) (42 USC, §7511b(e) and (f));

(H) clean-fueled vehicle requirements under FCAA, §246 (42 USC, §7586);

(I) motor vehicle emissions standards under FCAA, §202 (42 USC, §7521);

(J) standards for non-road vehicles under FCAA, §213 (42 USC, §7547);

(K) requirements for reformulated gasoline under FCAA, §211(k) (42 USC, §7545); or

(L) requirements for Reid vapor pressure standards under FCAA, §211(h) and (i) (42 USC, §7545(h) and (i));

(4) to allow an emissions increase of an air contaminant above a level authorized in a permit or other authorization that exceeds the limitations of §106.261 or §106.262 of this title (relating to Facilities (Emission Limitations); and Facilities (Emission and Distance Limitations)) except as approved by the executive director and the United States Environmental Protection Agency (EPA). This paragraph does not apply to limit the use of discrete emission credits [DERC or mobile DERC] in lieu of allowances under §101.356 of this title;

(5) to authorize a facility whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by such major source status;

(6) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director; or

(7) in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, if the NO_x DERC usage requested exceeds the limit specified in subsection (f) of this section.

(d) Notice of intent to use.

(1) A completed application form specified by the executive director, signed by an authorized representative of the applicant, must be submitted to the executive director in accordance with the following requirements.

(A) Discrete emission credits may be used only after the applicant has submitted the notice and received executive director approval.

(B) The application must be submitted:

(i) except as provided in subsection (f)(4) of this section, for NO_x DERC use in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, by August 1 before the beginning of the calendar year in which the DERCs are intended for use;

(ii) for [DERC] use for the Mass Emissions Cap and Trade Program in accordance with §101.356 of this title, by October 1 of the control period in which the DERC are intended for use; or

(iii) for [DERC] use for NSR offsets, as required by subsection (b)(2)(C) [(b)(2)(D)] of this section; or

(iv) for all other [discrete emission credit] use, at least 45 days before the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

(C) A copy of the application must also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area, as listed in 40 CFR Part 81 (2001).

(D) The application must include, but is not limited to, the following information for each use:

(i) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

(ii) the amount of discrete emission credits needed;

(iii) the baseline emission rate, activity level, and total emissions for the applicable facility or mobile source;

(iv) the actual emission rate, activity level, and total emissions for the applicable facility or mobile source;

(v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable local, state, and federal requirements;

(vi) a complete description of the protocol, as submitted by the executive director to the United States Environmental Protection Agency for approval, used to calculate the amount of discrete emission credits needed;

(vii) the actual calculations performed by the user to determine the amount of discrete emission credits needed;

(viii) the date that the discrete emission credits were acquired [or will be acquired];

(ix) the discrete emission credit generator and the original certificate number of the discrete emission credits acquired [or to be acquired];

(x) the price of the discrete emission credits acquired [or the expected price of the discrete emission credits to be acquired], except for transfers between sites under common ownership or control;

(xi) a statement that due diligence was taken to verify that the discrete emission credits were not previously used, the discrete emission credits were not generated as a result of actions prohibited under this regulation, and the discrete emission credits will not be used in a manner prohibited under this regulation;
and

(xii) a certification of use, that must contain certification under penalty of law by a responsible official of the user of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) Discrete emission credit use calculation.

(A) To calculate the amount of discrete emission credits necessary to comply with §§117.123, 117.320, 117.323, 117.423, 117.1020, 117.1220, or 117.3020 of this title (relating to Source Cap; and System Cap), a user may use the equations listed in those sections, or the following equations.

(i) For the rolling average cap:

Figure: 30 TAC §101.376(d)(2)(A)(i)

[Figure: 30 TAC §101.376(d)(2)(A)(i)]

$$C_{avg} = \frac{1}{N} \left[\sum_{i=1}^N E_i \right] + \left(\frac{N-1}{N} \right) C_{prev}$$

Where:

N = The total number of emission units in the source or system cap.

i = Each emission unit in the source or system cap.

EH_i = The expected new daily heat input, in million British thermal units (mmBtu) [MMBtu] per day.

ER_i = The expected new emission rate, in lb/MMBtu.

H_i = The actual daily heat input, in million British thermal units (MMBtu) per day, as calculated according to §§117.123(b)(1), 117.320(c)(1) and (2), 117.323(b)(1), 117.423(b)(1), 117.1020(c)(1), 117.1220(c)(1), or 117.3020(c) of this title as applicable.

R_i = The actual emission rate, in pounds (lb)/MMBtu, as defined in §§117.123(b)(1), 117.320(c)(1) and (2), 117.323(b)(1), 117.423(b)(1), 117.1020(c)(1), 117.1220(c)(1), or 117.3020(c) of this title as applicable.

d = The number of days that emissions are expected to exceed the source or system cap.

(ii) For maximum daily cap:

Figure: 30 TAC §101.376(d)(2)(A)(ii)

[Figure: 30 TAC §101.376(d)(2)(A)(ii)]

$$\frac{\sum_{i=1}^N EH_i}{N} \leq \frac{\sum_{i=1}^N EH_i}{N} \times \frac{d}{2000}$$

Where:

N = The total number of emission units in the source or system cap.

i = Each emission unit in the source or system cap.

EH_{Mi} = The expected new maximum daily heat input, in million British thermal units (mmBtu) [MMBtu] per day.

ER_i = The expected new emission rate, in lb/MMBtu.

HM_i = The maximum daily heat input, in MMBtu/day, as defined in §§117.123(b)(2), 117.320(c)(3), 117.323(b)(2), 117.423(b)(2), 117.1020(c)(2), or 117.1220(c)(2) of this title as applicable.

R_i = In lb/MMBtu, is defined as in §§117.123(b)(2), 117.320(c)(3), 117.323(b)(2), 117.423(b)(2), 117.1020(c)(2), or 117.1220(c)(2) of this title as applicable.

d = The number of days in the use period.

(B) The amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement is calculated as follows.

Figure: 30 TAC §101.376(d)(2)(B) (No change to the figure as it currently exists in TAC.).

(C) The amount of discrete emission credits needed to exceed an allowable emissions level is calculated as follows.

Figure: 30 TAC §101.376(d)(2)(C)

[Figure: 30 TAC §101.376(d)(2)(C)]

$$\frac{ELA - PLA}{R_i} \times HM_i$$

Where:

ELA = The expected level of activity.

PLA = The permitted level of activity.

PER = The permitted emission rate per unit activity.

(D) The user shall retire 10% more discrete emission credits than are needed, as calculated in this paragraph, to ensure that the facility or mobile source environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than 10 tons, an additional 5.0% of the discrete emission credits needed, as calculated in this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(3) A user may submit a late application in the case of an emergency, or other exigent circumstances, but the notice must be submitted before the discrete emission credits can be used. The user shall include a complete description of the situation in the notice of intent to use. All other notices submitted less than 45 days prior to use, or 90 days prior to use for a mobile source, will be considered late and in violation.

(4) The user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating facility or mobile source in the application. If the generator's credits are rejected or the application is incomplete, the use of discrete emission credits by the user may be delayed by the

executive director. The user cannot use any discrete emission credits that have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a facility or mobile source if the credit and use cannot be demonstrated to meet the requirements of this section.

(5) If the facility is in an area with an ozone season less than 12 months, the user shall calculate the amount of discrete emission credits needed for the ozone season separately from the non-ozone season.

(e) Notice of use.

(1) The user shall calculate:

(A) the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution, as described in subsection (d)(2)(D) of this section, associated with actual use; and

(B) the amount of discrete emission credits not used, including the amount of excess discrete emission credits that were purchased to cover the environmental contribution, as described in subsection (d)(2)(D) of this section, but not associated with the actual use, and available for future use.

(2) Discrete emission credit use is calculated by the following equations.

(A) The amount of discrete emission credits used to demonstrate compliance or meet a regulatory requirement is calculated as follows.

Figure: 30 TAC §101.376(e)(2)(A) (No change to the figure as it currently exists in TAC.)

(B) The amount of discrete emission credits used to comply with permit allowables is calculated as follows.

Figure: 30 TAC §101.376(e)(2)(B) (No change to the figure as it currently exists in TAC.)

(3) A form specified by the executive director for using credits must be submitted to the executive director [commission] in accordance with the following requirements.

(A) The notice must be submitted within 90 days after the end of the use period. Each use period must not exceed 12 months.

(B) The notice is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that

reported in the notice of intent to use, including, but not limited to, the following items:

(i) purchase price of the discrete emission credits obtained prior to the current use period, except for transfers between sites under common ownership or control;

(ii) the actual amount of discrete emission credits possessed during the use period;

(iii) the actual emissions during the use period for volatile organic compounds and nitrogen oxides;

(iv) the actual amount of discrete emission credits used;

(v) the actual environmental contribution; and

(vi) the amount of discrete emission credits available for future use.

(4) Discrete emission credits that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion

of the calculated environmental contribution not attributed to actual use is also available.

(5) The user is in violation of this section if the user submits the report of use later than the allowed 90 days following the conclusion of the use period.

(f) DERC use in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(1) For the 2015 calendar year, the use of NO_x DERCs in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties may not exceed 42.8 tons per day.

(2) Beginning in the 2016 calendar year, the use of NO_x DERCs in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties may not exceed 17.0 tons per day.

(3) If the total number of DERCs submitted for the upcoming calendar year in all applications received by the August 1 deadline in subsection (d)(1)(B)(i) of this section is greater than the applicable limit in paragraph (1) or (2) of this subsection, the executive director shall apportion the number of DERCs for use.

(A) In determining the amount of DERC use to approve for each application, the executive director may take into consideration:

(i) the total number of DERCs existing in the nonattainment area bank;

(ii) the total number of DERCs submitted for use in the upcoming control period;

(iii) the proportion of DERCs requested for use to the total amount requested;

(iv) the amount of DERCs required by the applicant for compliance;

(v) the technological and economic aspects of other compliance options available to the applicant; and

(vi) the location of the facilities for which owners or operators are requesting use of DERCs.

(B) The executive director shall consider the appropriate amount of DERCs allocated for each application submitted on a case-by-case basis.

(4) If the total number of DERCs submitted for use during the upcoming calendar year in all applications received by the August 1 deadline in subsection (d)(1)(B)(i) of this section is less than the limit, the executive director may:

(A) approve all requests for DERC usage provided that all other requirements of this section are met; and

(B) consider any late application submitted as provided under subsection (d)(3) of this section that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in paragraph (5) of this subsection, but will not otherwise approve a late submittal that would exceed the limit established in this subsection.

(5) If the applications are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the limit established in this subsection and may be approved provided all other requirements are met. For the purposes of this paragraph, an ERCOT-declared emergency situation is defined as the period of time that an ERCOT-issued emergency notice or energy emergency alert (EEA) (as defined in ERCOT Nodal Protocols, Section 2: Definitions and Acronyms (June 1, 2012) and issued as specified in ERCOT Nodal Protocols, Section 6: Adjustment Period and Real-Time Operations (June 1, 2012)) is applicable to the serving electric power

generating system. The emergency situation is considered to end upon expiration of the emergency notice or EEA issued by ERCOT.

(g) Inter-pollutant use of discrete emission credits [DERCs]. With prior approval from the executive director and the EPA, a NO_x or VOC discrete emission credit [DERC] may be used to meet the NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution.

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 10, 2017

Mr. Samuel Coleman
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Subject: Request for Parallel Process Review of the Proposed Revisions to 30 Texas Administrative Code, Chapter 101, Subchapter H, Division 1, Emission Credit Program, and Division 4, Discrete Emission Credit Program, and Revision to the State Implementation Plan (SIP)

Dear Mr. Coleman:

The Texas Commission on Environmental Quality (TCEQ) respectfully requests that the United States Environmental Protection Agency (EPA) parallel process the enclosed proposed revisions to 30 Texas Administrative Code Chapter 101, Subchapter H, Division 1, Emission Credit Program, and Division 4, Discrete Emission Credit Program, and corresponding revision to the SIP. This SIP revision is an update to the Emissions Banking and Trading SIP revision that was submitted to the EPA on August 14, 2015, and is still under consideration by the EPA. The proposed rules were approved by the TCEQ's commissioners on March 8, 2017, for publication, solicitation of public comment, and public hearings. Public hearings are scheduled for April 18, 2017 in Houston; April 19, 2017 in Arlington; and, April 20, 2017 in Austin. The comment period closes April 24, 2017. The rules are scheduled for adoption by the commissioners on August 23, 2017.

The proposed rules and SIP revision primarily address implementation issues with the generation of emissions credits for area and mobile sources. The current Emissions Banking and Trading rules already allow area and mobile sources to generate credits from emission reductions. These proposed rules address issues related to demonstrating that reductions are real, quantifiable, permanent, enforceable, and surplus to the SIP and all applicable rules and that discrete emissions credits are real, quantifiable, and surplus to the SIP and all applicable rules.

To prevent implementation issues, the proposed rules and SIP revision address the types of sources eligible to generate credits; the quantity of credits that could be generated by area and mobile sources; protective reductions in the amount of credits issued to area and mobile sources for shutdowns and new types of protocols; the time frame for credit generation, including transition opportunities; and, recordkeeping and other potential on-going requirements.

To address key issues in the rulemaking prior to proposal, we have currently held nine formal stakeholder meetings and numerous meetings that included the EPA, the Environmental Defense Fund, and industry representatives. I very much appreciate the cooperation and input and the time EPA staff have devoted to working with our program staff in developing this proposal packet. We are available to continue working with your staff to ensure that EPA Region 6 can parallel process the review to ensure end users of area and mobile credits have confidence in using these credits as offsets for federal new source review nonattainment permits.

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • tceq.texas.gov

How is our customer service? tceq.texas.gov/customersurvey

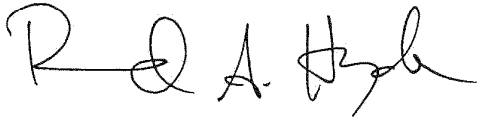
printed on recycled paper using vegetable-based ink

ED_001237_00027636

Mr. Samuel Coleman
March 10, 2017
Page 2

An electronic version of the enclosed rule and SIP revision has been sent to Wren Stenger at EPA, Region 6. If you have any questions or need additional information, please contact David Brymer at (512) 239-1725.

Sincerely,

A handwritten signature in black ink, appearing to read "R A Hyde". The signature is fluid and cursive, with the first name "R" being large and prominent, followed by "A" and "Hyde".

Richard A. Hyde, P.E.,
Executive Director
Texas Commission on Environmental Quality

Enclosure

To: David Brymer[david.brymer@tceq.texas.gov]
From: Donaldson, Guy
Sent: Tue 1/10/2017 7:28:37 PM
Subject: Re: Csapr remand rule

Thx,

Sent from my iPhone

> On Jan 10, 2017, at 11:52 AM, David Brymer <david.brymer@tceq.texas.gov> wrote:
>
> TCEQ did not comment.
>
> -----Original Message-----
> From: Donaldson, Guy [mailto:Donaldson.Guy@epa.gov]
> Sent: Tuesday, January 10, 2017 11:48 AM
> To: David Brymer <david.brymer@tceq.texas.gov>
> Subject: Csapr remand rule
>
> The comment period closed yesterday on the remand rule proposing to remove Texas from Casper for
so2. Did you guys comment?
>
> Sent from my iPhone

To: dbrymer@tceq.state.tx.us[dbrymer@tceq.state.tx.us]
From: Donaldson, Guy
Sent: Tue 1/10/2017 5:48:12 PM
Subject: Csapr remand rule

The comment period closed yesterday on the remand rule proposing to remove Texas from Casper for so2. Did you guys comment?

Sent from my iPhone

To: Snyder, Erik[snyder.erik@epa.gov]; Huser, Jennifer[huser.jennifer@epa.gov]; Medina, Dayana[Medina.Dayana@epa.gov]; Kordzi, Joe[Kordzi.Joe@epa.gov]; Feldman, Michael[Feldman.Michael@epa.gov]; Grady, James[Grady.James@epa.gov]
From: Donaldson, Guy
Sent: Tue 12/27/2016 4:15:42 PM
Subject: FW: EPA RH webinar [WARNING: DKIM validation failed]
[EPA RH webinar](#)

Awkward that this is scheduled for the same day as the Texas hearing.

From: Theresa Pella [mailto:tpella@censara.org]
Sent: Monday, December 19, 2016 11:59 AM
To: Ashley Jurgensmeyer <ashley.jurgensmeyer@dnr.mo.gov>; Ashley Keas <Ashley.Keas@dnr.mo.gov>; Ann Spitz <aspitz@kdheks.gov>; Avey, Lance <Avey.Lance@epa.gov>; Beverly Botchlet-Smith <beverly.botchlet-smith@deq.ok.gov>; Bret Anderson <baanderson02@fs.fed.us>; Brooks Kirlin <brooks.kirlin@deq.ok.gov>; Carrie Wiese <carrie.wiese@nebraska.gov>; Catharine Fitzsimmons <catharine.fitzsimmons@dnr.iowa.gov>; Cheryl Bradley <Cheryl.Bradley@deq.ok.gov>; David Clark <CLARKD@adeq.state.ar.us>; David Brown <dave.l.brown@nebraska.gov>; Donna Huff <dhuff@tceq.texas.gov>; Douglas Watson <dwatson@kdheks.gov>; Eddie Terrill <eterrill@deq.ok.gov>; Gilberto Cuadra <Gilberto.Cuadra@LA.GOV>; Donaldson, Guy <Donaldson.Guy@epa.gov>; Heather.Lerch@deq.ok.gov; japrentice@kdheks.gov; Jim Price <jim.price@tceq.texas.gov>; Jocelyn Mellberg <jocelyn.mellberg@tceq.texas.gov>; Harper, Jodi <Harper.Jodi@epa.gov>; Kordzi, Joe <Kordzi.Joe@epa.gov>; john babin <john.babin@la.gov>; John Minter <john.minter@tceq.texas.gov>; jprentice@kdheks.gov; Kathy Pendleton <kathy.pendleton@tceq.texas.gov>; Kevin Stoner <kevin.j.stoner@nebraska.gov>; Kim Herndon <kim.herndon@tceq.texas.gov>; Kyra Moore <kyra.moore@dnr.mo.gov>; laura.finley@deq.ok.gov; Lee Warden <Lee.Warden@deq.ok.gov>; lisa.alam@nebraska.gov; Logan, Judy <jlogan@fs.fed.us>; Lynn Deahl <LDeahl@kdheks.gov>; margaret.earnest@tceq.texas.gov; Mark McCorkle <MAC@adeq.state.ar.us>; Matthew Johnson <matthew.johnson@dnr.iowa.gov>; Feldman, Michael <Feldman.Michael@epa.gov>; Jay, Michael <Jay.Michael@epa.gov>; montgomery@adeq.state.ar.us; patricia_f_brewer@nps.gov; patricia.maliro@dnr.mo.gov; Petre, Jacob <Jacob.Petre@deq.ok.gov>; Rick Brunetti <rbrunetti@kdheks.gov>; Ron Thomas <ron.thomas@tceq.texas.gov>; Sonya Eastern <Sonya.Eastern@LA.GOV>; spencer@adeq.state.ar.us; Stacy Allen <stacy.allen@dnr.mo.gov>; stephanie.shirley@tceq.texas.gov; Krabbe, Stephen <Krabbe.Stephen@epa.gov>; Stephen M. Hall <stephen.hall@dnr.mo.gov>; Terry Salem <terry.salem@tceq.texas.gov>; Theresa Pella <tpella@censara.org>; Tim Allen <tim_allen@fws.gov>; Tim E. Burns (PWks) <tim.burns@cityofomaha.org>; vennetta.hayes@la.gov; Vivian Aucoin <Vivian.Aucoin@LA.GOV>; Walker Williamson <walker.williamson@tceq.texas.gov>; Wendy Walker <wendy.walker@dnr.iowa.gov>; Wharton, Tracy <tracy.wharton@nebraska.gov>; Wilbur, Emily <emily.wilbur@dnr.mo.gov>; Wolkins, Jed <wolkins.ied@epa.gov>; Andres Monreal <andres.monreal@ktttribe.org>; @yahoo.com; ahathcoat@cherokee.org; amuller@potawatomi.org;

Ex. 6 - Personal Privacy

Ex. 6 - Personal Privacy @estoo.net; bross@unitedkeetoowahband.org; director.mdnr@meskwaki-nsn.gov;
CKreman@quapawtribe.com; dshields@kickapootribeofoklahoma.com;
Ex. 6 - Personal Privacy @yahoo.com; Ex. 6 - Personal Privacy @gmail.com; grose_coushattatribela.org
<grose@coushattatribela.org>; hwebb@miamination.com; battise.jenna@actribe.org;
joseph.painter@winnebago-tribe.com; kenj@astribe.com; Ex. 6 - Personal Privacy @yahoo.com;
srking@unitedkeetoowahband.org; SAttocknie@quapawtribe.com; tom-elkins@cherokee.org;
tonydarden@chitimacha.gov; valeclere@pbpnation.org; alisha.bartling@santeeoep.com
Subject: Fw: EPA RH webinar [WARNING: DKIM validation failed]

Date and time for EPA's webinar is Tuesday, Jan. 10th, from 11:30 - 1:00 pm central time.

<https://www.epa.gov/visibility/webinar-announcement-informational-public-webinar-discuss-final-regional-haze-rule>

Theresa Pella, Executive Director

Central States Air Resource Agencies Association (CenSARA)

P.O.Box 617, 707 N. Robinson Ave.

Oklahoma City, OK 73101

405-813-4301 (office)

512-585-1511 (mobile)

tpella@censara.org

<http://www.censara.org>

From: Theresa Pella
Importance: Normal
Subject: EPA RH webinar
Start Date/Time: Tue 1/10/2017 5:30:00 PM
End Date/Time: Tue 1/10/2017 7:00:00 PM

....

EPA plans to hold an informational public webinar on Tuesday, **January 10, 2017** from **12:30-2:00pm EST**. During this webinar, we will provide an overview of the final Regional Haze Rule revisions. There is no phone line; audio will be only via the webinar.

Webinar URL: <https://epawebconferencing.acms.com/reghazeamend>

To: Kim Herndon[Kim.Herndon@tceq.texas.gov]
Cc: David Brymer[david.brymer@tceq.texas.gov]
From: Donaldson, Guy
Sent: Mon 12/12/2016 2:25:20 PM
Subject: RE: BART FIP

By now you have heard it got signed. Be aware somebody notice a typo in one of the tables that we are working on correcting. Hope to send an updated version soon.

From: Kim Herndon [mailto:Kim.Herndon@tceq.texas.gov]
Sent: Friday, December 09, 2016 10:54 AM
To: Donaldson, Guy <Donaldson.Guy@epa.gov>
Cc: David Brymer <david.brymer@tceq.texas.gov>
Subject: BART FIP

Guy,

I have had a couple of folks ask if the BART FIP is going to be signed today as scheduled. Could you please let me know if it is going to happen?

Thanks,

Kim

Kim Herndon, Assistant Division Director

Texas Commission on Environmental Quality

Office of Air, Air Quality Division

512 239-1421



To: Robinson, Jeffrey[Robinson.Jeffrey@epa.gov]; Stanton, Marya[Stanton.Marya@epa.gov]; Wiley, Adina[Wiley.Adina@epa.gov]; Robinson, Jeffrey[Robinson.Jeffrey@epa.gov]
From: Donaldson, Guy
Sent: Mon 11/28/2016 5:41:02 PM
Subject: RE: Info on CSAPR Update for 2018 State Allocation Option
Region6 Ozone Season NOx .xls

Well, I see why Oklahoma utilities are concerned by the rule change.

I took the spreadsheet of allowances and whittled it down so I could see just the Region 6 states and just NOx.

It looks like Texas and Louisiana don't have any reductions at all but Oklahoma has probably a 30 or 40% reduction. I don't see how all of that is supposed to happen.

From: Robinson, Jeffrey
Sent: Monday, November 28, 2016 11:11 AM
To: Donaldson, Guy <Donaldson.Guy@epa.gov>; Stanton, Marya <Stanton.Marya@epa.gov>
Subject: FW: Info on CSAPR Update for 2018 State Allocation Option

FYI on note Adina sent out this morning.

From: Wiley, Adina
Sent: Monday, November 28, 2016 11:06 AM
To: bryan.johnston@la.gov; Cheryl Bradley (cheryl.bradley@deq.ok.gov) <cheryl.bradley@deq.ok.gov>; lindley.anderson@tceq.texas.gov; Tricia Treece (treecep@adeq.state.ar.us) <treecep@adeq.state.ar.us>; vennetta.hayes@la.gov; Vivian Aucoin (vivian.aucoin@la.gov) <vivian.aucoin@la.gov>
Cc: Robinson, Jeffrey <Robinson.Jeffrey@epa.gov>
Subject: Info on CSAPR Update for 2018 State Allocation Option

Good Morning,

The CSAPR Update rule allows a state to submit a SIP revision establishing allowance allocations for existing units for the second compliance year (2018) for the new and revised budgets in order to replace the FIP-based allocations. The process is the same as under the original CSAPR rulemaking with deadlines shifted roughly 2 years: A state that wishes to take advantage of this option must submit a letter to EPA by December 27, 2016, indicating its intent to submit a complete SIP revision by April 1, 2017. The SIP must provide, in an EPA-prescribed format, a list of existing units and their allocations for the 2018 control period. If a state does not submit a letter of intent to submit a SIP revision, FIP allocations will be recorded by January 9, 2017. If a state submits a timely letter of intent but fails to submit a SIP revision, FIP allocations will be recorded by April 15, 2017. If a state submits a timely letter of intent followed by a timely SIP revision that is approved, the approved SIP allocations will be recorded by October 1, 2017.

The Clean Air Markets Division has updated the associated documents and information for these SIP revisions. This information, including a template for the December letter, a template and instructions for the list of existing unit allocations for 2018, and a fact sheet for this SIP revision, can be found at:

- [2018 SIP Notification letter format \(https://www.epa.gov/csapr/cross-state-air-pollution-rule-resources-implementation\)](https://www.epa.gov/csapr/cross-state-air-pollution-rule-resources-implementation)
- [CSAPR Update 2018 Allocations Template \(https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-allowance-allocations-and-templates\)](https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-allowance-allocations-and-templates)
- [Instructions for the 2018 Allocations Template \(https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-allowance-allocations-and-templates\)](https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-allowance-allocations-and-templates)
- [Fact Sheet, SIP Process for 2018 Allowance Allocations \(https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-fact-sheets\)](https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-fact-sheets)

Link to CSAPR Update Rule: <https://www.gpo.gov/fdsys/pkg/FR-2016-10-26/pdf/2016-22240.pdf>

Please contact your EPA Regional CSAPR representative with any questions.

Thank you!

Adina R. Wiley, Environmental Engineer

U.S. EPA Region 6

Air Permits Section (6MM-AP)

1445 Ross Ave.

Dallas, TX 75202

(214) 665-2115

wiley.adina@epa.gov

POSITIONS or VIEWS EXPRESSED DO NOT REPRESENT OFFICIAL EPA POLICY

To: Dunham, Sarah[Dunham.Sarah@epa.gov]
From: Lewis, Josh
Sent: Fri 3/24/2017 4:53:41 PM
Subject: FW: Materials for Mandy
[RFS Point of Obligation Backgrounder 2.24.17.docx](#)
[signed-response-san-joaquin-2016-12-20.pdf](#)
[Final RH Paper - March 21.docx](#)
[RTR decision March 13 2017.pdf](#)
[126 Petitions Update 03_02_17.pptx](#)
[Ozone Designations.docx](#)
[monitoring.docx](#)

Can you take a quick look at the list below and confirm this covers everything we discussed sending?

Hi Mandy,

Attached is a bunch of follow up from our conversations earlier in the week. I think this hits the major items, though if you see anything missing please let me know. (Sarah will be sending one follow up item – the RFS background paper – separately).

(1) Point of obligation – Background Paper from 2/24 attached

(2) NOx letter we sent to petitioners. One example attached. More background at:

<https://www.epa.gov/regulations-emissions-vehicles-and-engines/petitions-revised-nox-standards-highway-heavy-duty>

(3) Regional Haze – background paper attached. We will also figure out a time soon to brief you on this.

(4) March 13th court decision re: schedule for 20 RTRs (Sarah has already sent the more recent, March 22nd decision on additional RTR source categories)

(5) Powerpoint on status of CAA 126 petitions

(6) Ozone designations – attached is a quick response to your question regarding whether we

Ex. 5 - Deliberative Process and Attorney-Client

(7) Cost of air monitors + use of modeling v. modeling in nonattainment determinations (which ends up being an issue mainly for SO₂ and not for the other NAAQS pollutants) – the final attached word document addresses both of these questions.

